

**EGYPTIAN AND SUDANESE PRACTICE ON STATE IMMUNITIES
WITH PARTICULAR REFERENCE TO THE
ISLAMIC PERSPECTIVE**

by

EL FATIH EL RASHEED ABDEL RAHMAN

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ABSTRACT

This study examines the evolution of the restrictive theory of immunity and identifies the various rationales which have contributed to its emergence at three levels. In the present study it is shown that all legal systems do not treat issues of sovereign immunity similarly. A comparative law study provides the opportunity to examine different approaches to immunity and explore the characteristics peculiar to a society that are responsible for generating a particular approach.

Part I deals with the origin of the rule of state immunity and the evolution in legal analysis which gave rise to the restrictive theory of sovereign immunity under contemporary international law.

The purpose of Part II, namely Egyptian and Sudanese Practice on the subject, is to show that, although the phenomenon of restrictive immunity is widespread, there are nevertheless profound divergences even between two neighbouring Arab states - and even undeniable incoherences within one of them. This part endeavours to clarify those practices and to relate them to contemporary international practice. This objective seems particularly appropriate in the light of the development of new kinds of commercial activities undertaken by these countries as developing nations to promote foreign investment and trade.

Part III deals with the Islamic conception of sovereign immunity. The examination of the Islamic perspective verifies the extent of its past contribution to the development of the rule of state immunity and surveys the possibilities of its further contributions in the future. Through this approach, contemporary rules of international law on sovereign immunity will probably prove to be more readily accepted, widely recognized and strongly supported.

The conclusions which build on the preceding parts are provided in the last chapter.

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LIST OF ABBREVIATIONS

A.C.	Law Reports, Appeal Cases
A-D.	Annual Digest and Reports of Public International Law
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
ALL E.R.	The Law Reports, All England Reports
ALQ	Arab Law Quarterly
APSR	American Political Science Review
AYBIL	Australian Year Book of International Law
Beav.	Reports of Cases in Chancery Argued and Determined in the Rolls Court, by Charles Beaven
BJIL	Brooklyn Journal of International Law
BLJ	Bulletin de legislation et de jurisprudence Egyptiennes (Alexandria)
BYBIL	British Year Book of International Law
Cam.L.J.	Cambridge Law Journal
Col.L.Rev.	Columbia Law Review
Col.J.Transnat'l L.	Columbia Journal of Transnational Law
Cranch	W. Cranch, Reports of cases argued and adjudicated in the Supreme Court of the United States
CLP	Current Legal Problems
DRSG	Democratic Republic of The Sudan Gazette
ESS	Encyclopedia of Social Sciences
F.R.	Federal Reporter
F.2nd	Federal Reporter (Second Series)
F. Supp.	Federal Supplement
GBPP	Great Britain Parliamentary Papers.
Gaz.Trib.Mix.	Gazette des Tribunaux Mixtes d'Egypte (Alexandria)
GWLR	George Washington Law Review
GJILE	Georgia Journal of International Law and Economics
Har.Int.L.J.	Harvard International Law Journal
Har.L.Rev.	Harvard Law Review
H.L.Deb.	House of Lords Debates

ABBREVIATIONS (contd.)

Hyderabad Aca. Stu.	Hyderabad Academy Studies
ICC	International Chamber of Commerce
ICJ Reports	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
Int.L.	International Lawyer
ICLQ	International and Comparative Law Quarterly
IFS	International Financial Statistics
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
ICSID. Rev.-FILJ	International Centre for Settlement of Investment Disputes Review - Foreign Investment Law Journal
Int.Fin.L.Rev.	International Financial Law Review
Isl.Cul.	Islamic Culture
Isl.Lit.	Islamic Literature (Lahore)
Isl.Qua.	Islamic Quarterly
Isl.Rev.	Islamic Review
Isl.Stu.	Islamic Studies (Islamabad)
IYBIA	Indian Year Book of International Affairs
IYBIL	Indian Year Book of International Law
J.C.L. & I.L.	Journal of Comparative Legislation and International Law
J.Dod.	J.D. Dodson, Report of Cases Argued and Determined in the High Court of Admiralty
JIA	Journal of International Arbitration
JPHS	Journal of The Pakistan Historical Society
J.Mar.L.	Journal of Maritime Law
K.B.	Law Reports, King's Bench
L.Cont.Pro.	Law and Contemporary Problems
LQR	Law Quarterly Review
LNOJ	League of Nations Official Journal
LNTS	League of Nations Treaty Series
L.R. A. & E.	Law Reports, Admiralty & Ecclesiastical cases

ABBREVIATIONS (contd.)

MCA	Mixed Court of Appeal
MCC	Mixed Civil Code
MEJ	Middle East Journal
MES	Middle Eastern Studies
Mich.L.R.	Michigan Law Review
MLR	Modern Law Review
NCJIL	North Carolina Journal of International Law
NILR	Netherlands International Law Review
NYBIL	Netherlands Year Book of International Law
NYULR	New York University Law Review
OIC	Organization of Islamic Conference
PASIL	Proceedings of the American Society of International Law
PCIJ	Permanent Court of International Justice
P.D. (or P.)	The Law Reports Probate, Divorce and Admiralty
PLD	All Pakistan Legal Decisions
Q	The Holy Qur'an
Q.B.	The Law Reports, Queen's Bench Reports
RDC	Recueil de Cours de l'Academie de Droit International de La Haya
Rev.Egy.Dro.Int.	Revue Egyptienne de Droit International
ROJ	Reglement d'Organisation Judiciare
SLJR	Sudan Law Journal and Reports (Khartoum)
T.L.R.	The Law Reports, Times Law Reports
Trans.Gro.Soc.	Transactions of the Grotious Society
UN	United Nations
UNRIAA	United Nations Report of International Arbitral Awards
UNTS	United Nations Treaty Series
UNYB	United Nations Year Book
UPLR	University of Pennsylvania Law Review
U.S.	United States Reports
USC	United States Code
Va.J.Int.L.	Virginia Journal of International Law
Vand.Transn'l L.	Vanderbilt Journal of Transnational Law

ABBREVIATIONS (contd.)

W.L.R	The Law Reports, Weekly Law Reports
YB Com.Arb.	Year Book of Commercial Arbitration
YBILC	Year Book of International Law Commission
YLJ	Yale Law Journal
ZaoR	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

PART I

**GENERAL SURVEY OF THE HISTORICAL EVOLUTION
OF THE LAW OF SOVEREIGN IMMUNITY**

CHAPTER ONE

HISTORICAL AND LEGAL DEVELOPMENTS OF THE RULE OF STATE IMMUNITY

I. THE RULE OF STATE IMMUNITY IN CLASSIC INTERNATIONAL LAW

In the formative stages of international law, legal and political writers had considerable influence upon the formulation of its rules. Many of them were citizens of major powers, quite aware of the legal problems resulting from territorial expansion overseas and the increasing volume of relations of their states. Their contribution to international law generally, and those concerning sovereign immunity in particular, was two-fold: they collected existing norms and suggested new ones; and provided theoretical and philosophical foundations, justifications and guidelines for those rules. Against this background it is relevant to enquire if any doctrine of state immunities existed in their time. However, it should be noted that a survey of the works of some of these writers revealed no trace of the doctrine of state immunity although they have devoted marked attention to diplomatic immunities issues. Perhaps one explanation was that there seem to be no judicial decisions concerning immunities of foreign states before the nineteenth century.

One of the greatest of the classical writers, Alberico Gentili (1551-1608), treated the question of immunities in the context of contracts concluded by ambassadors. He maintained that: "an ambassador should be subject to legal procedure in every contract which he enters into during his embassy".¹ The justification for this rule of non-immunity is:

.... to prevent ambassadors from having the power of carrying home the property of others, or to preclude the possibility of a situation in which no one would be willing to make a contract with them, they would be in a certain sense barred from commerce. 2

The latter justification appears to be based on practical considerations, while the former is based on the natural law rule, that it is in the interest of justice that no one may increase his wealth to the detriment and loss of another.

Hugo Grotius (1583-1654), carried the investigation further by discussing the personal inviolability of ambassadors. After examining the various arguments adduced by jurists, he concluded that:

.... the rule has been accepted by the nations that the common custom, which makes a person who lives in foreign territory subject to that country, admits of an exception in the case of ambassadors. 3

He regarded ambassadors as representatives of those who sent them and thus not subject to the municipal law of the state to which they are accredited.

Writing in 1721, Bynkershoek (1673-1743) advocated the combination of reasons and precedents as the one source of jus gentium. According to his thesis, jus gentium provides rules of conduct which, guided by reason, holds between nations. Custom, in order to be binding, must pass the test of reasoning. Where the practice is scanty or contradictory, reason provides the rule.⁴ On a priori reasoning, he moves from the immunities of ambassadors to establish the immunities of the princes.⁵ He argued that, since immunities of ambassadors were well established in practice and since they were granted because ambassadors represent their sovereigns, it would be absurd to grant the ambassadors less privileges than the mandatory.

Similarly, Vattel (1700-1769), writing 35 years later, could only say of the prince that he was entitled to all rights of ambassadors.⁶ The reason seems to be that there was still little relevant practice in the matter of travelling and visiting rulers. At any rate Vattel adds no precedent.⁷

The immunities of states, as juridical persons, and of their property, attracted less attention than those of sovereigns in the

literature of international law prior to the 19th century. This was quite understandable so long as the state was identified with its ruler, and the sovereign was construed largely in terms of an individual person. The only passage in Bynkershoek's work which can be taken as touching on the matter, albeit indirectly, is the authority cited in Chapter IV of his De Foro Legatorum where he mentioned that it was fruitless and expressed great indignation to the Republic of Venice that a sum of money owed to the Republic was to be attached by an Amsterdam merchant.⁸ But we might have expected Vattel to provide some answers, since he had a clear-cut theory of the state as a juristic person, of which its ruler is only an organ, to deal with the position of that juristic person in foreign courts. He does distinguish between the property of the state and private property in connection with conquest which, he says, does not affect private title. In another passage he speaks briefly of rights conceded by one nation in its territory to another: various sovereigns in the Indies, he says, have granted the right to establish trading stations and ports in their realms, and such rights are part of the grantee's property and must be respected like his ancient possessions. But of immunity of states from suit, or their property from seizure, he says nothing.⁹

The absence of reference in the classical writings to the concept of state immunities can best be explained by the fact that the actual concept of the state did not as yet exist. The personal immunities of kings, presidents and diplomatic agents are derived from the special respect due to the group entity of which they are organs. Historically, however, the immunity of states is indeed a recent phenomenon. The concept of state immunity, as we know it today, has evolved from sovereign immunity, and the latter has developed by analogy with the norms applied to diplomatic immunities, the argument being that it was difficult to deny the sovereign what was conceded to an ambassador. From the 19th century national courts began to formulate the doctrine of state immunity.

Badr maintains that even the classical writers can be read to support the principle of restrictive immunity. He cites Vattel's distinction between the sovereign's private and public acts on the one hand, and between his private and public property on the other;¹⁰ and considers Bynkershoek to say that: "the goods of a sovereign, however acquired, whether of a public or private nature, were liable to process to compel an appearance" and that the property of a sovereign was subject to the jurisdiction of the local judge.¹¹

This conclusion, it may be remarked, is difficult to sustain. It is somewhat premature to speak about the concept of restricted state immunity in Bynkershoek and Vattel's works. Actual concept of state, as opposed to the concept of a sovereign, was developed much later; their theories and exposition have a strong connection with the historical context in which they arose. There is little evidence to suggest that these authorities really support the restricted doctrine of immunity as it is known today.

II. THE RULE OF STATE IMMUNITY IN MODERN INTERNATIONAL LAW

1. The Origin of the Rule

(a) A sequence of personal immunity in common law jurisdiction

The concept of state immunities has been developed differently in different legal systems. In common law jurisdiction the doctrine of immunity of foreign states has been influenced by the traditional immunities of the local sovereign.¹² In England, as Sucharitkul observes, the doctrine has been a direct inheritance of internal constitutional practice, expressing the maxim: "The king cannot be sued in his own courts". To subject the king to the local jurisdiction was a "constitutional impossibility", he writes:

As the King personified the state, constitutionally speaking the courts which formed part of the government of the state could not logically exercise jurisdiction over the sovereign in whose name, and in whose name only, they could act.

From this he concludes:

the immunity of the crown was later extended to cover the case of foreign sovereigns with whom foreign states have subsequently identified. 13

However, it is arguable that immunity of a foreign sovereign is not identical with that of the local sovereign. The latter may rest entirely upon constitutional provisions or customs which, if fairly construed, confer or deny the right to sue. But the appeal to rule as to the local sovereign may be useful by way of an analogy, either as a ground for allowing immunity or as a basis for an argument that no greater immunity should be given to a foreign sovereign than that given to the sovereign of the territorial jurisdiction.

Thus the English courts, influenced to a considerable extent by the position of a local sovereign, developed precedents granting foreign sovereigns exemptions from territorial jurisdiction. The immunity of the crown is later extended by way of analogy to cover also the sovereign heads of other nations. In the Prins Frederick case (1820),¹⁴ the court upheld immunity and declined jurisdiction on the ground that the foreign state, as personified by the foreign sovereign, was equally sovereign and independent, and that to subject him to the domestic jurisdiction would insult his "real dignity". In applying international law to the problem of suits against foreign sovereigns, the English courts also considered these rules of paramount importance and thus felt that jurisdiction cannot be assumed without violating these principles. In 1850, in The Matters of Wadworth v. The Queen of Portugal,¹⁵ the court held that, without his consent, a foreign sovereign could not be made amenable to the jurisdiction of an English court. Chief Justice Campbell said: "... To cite a foreign potentate in a court, is contrary to the law of nations, and an insult which he is entitled to resent".¹⁶

Other rationales for the doctrine of state immunity advanced by the English courts were based on the theory of equality of states

and the principle of consent. In Parlement Belge,¹⁷ after a review of English and foreign cases, Lord Justice Brett declared:

The principle to be deduced from all cases is that, as a consequence of the absolute independence, of every sovereign authority and of international comity which induces every sovereign state to respect the independence and dignity of every other foreign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any other state which is destined for public use, or over the property of any ambassador, though such sovereign or ambassador property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction. 18

This received further confirmation by Lord Atkin in the Cristina case.¹⁹ His judgement on such a rule was based on the following propositions:

The foundation for application to set aside a writ and arrest of a ship is to be found in two propositions of international law engrafted into our domestic law which seems to me to be well established and to be beyond dispute. The first is that the court of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve a process against his person or seek to recover from him specific property or damages.

The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. 20

In the United States, the exemption of foreign sovereigns from local jurisdiction is a product of the federal system, in particular of reciprocal relations between the federal union and member states.²¹ During the formative period of the union the question was directly raised in a number of cases decided by the courts of different individual members of the union.²² These and other cases led Justice Holmes, in a case concerning the territory of Hawaii, to observe that an entity which is the source of rights is above the rule of law, by basing immunity "on the logical and practical grounds that there can be no legal right as against the authority that makes the law on which the right depends".²³ This view received a judicial confirmation in the Mississippi case (1934) in

the following words:

There is the postulate that states of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention". 24

(b) Civil law tradition: primarily a question of competence

In civil law, state immunity was originally a question of "competence" or jurisdiction of the court. For example, in France, the principle of state immunity has received broad application. The system of the administrative courts, the Conseil d'Etat, under which an action may lie against the state, influenced to a measurable extent the development of the concept.²⁵ A distinction has been drawn between certain acts of the government which are subject to the jurisdiction of the Conseil d'Etat and other governmental acts which are not. Within the latter falls the category of acts attributable to foreign states, emanating from the sovereign authority of the government. It was upon this distinction that the Court of Cassation on 22 January 1849, ruled that Art. 14 of the Code Civil, which permits suits against foreigners for liabilities arising out of obligations contracted in France or abroad with French nationals, was not applicable to foreign states.²⁷ Subsequent judgements in France have closely followed the same lines. In April 1847, the Civil Tribunal of the Seine rendered a decision²⁸ in which it was held that the suit involved examination of an act by a foreign government for which the French court was without competence. The heavily criticised judgement of the Court of Cassation (1849) in the matters of the Spanish government is responsible for laying down the rule for the first time in French jurisprudence. The court held that the reciprocal independence of states was one of the most universally recognized principles of international law; that no government could be subjected against its will to the jurisdiction of a foreign state, since the right of jurisdiction was inherent in its sovereignty.²⁹ Despite the criticism directed against the decision,³⁰ the French court firmly adhered to the view that, when a foreign state was

sued, the French courts did not distinguish between its private and sovereign authority, but had declared themselves equally incompetent to determine such suits.

In Belgium, the question of immunity from jurisdiction of foreign states is a problem of ratione personae, Art. 14 of the Civil Code, modified by Art. 52 of 1876 Law on Competence, giving the Belgians the right to sue foreigners before Belgian courts. As in France, it was long admitted in Belgium that the word foreigners only applied to individuals and could not be relied upon to extend the jurisdiction of the Belgian courts over a public act of a foreign state.³¹ This view received judicial endorsement by the Brussels Court of Appeal on December 30, 1840.³² The Court held that Article 14 of the Civil Code "in the natural meaning of its terms, only concerns foreign private persons". The immunity accorded to the Government of Holland and the Dutch syndicate by the decision was said to rest on "the mutual independence and equality of nations". The extraterritoriality of ambassadors was extended by the Court to the accrediting state itself by way of analogy.

The independence and sovereignty of states had also been relied upon by Italian courts to exempt foreign states from their jurisdiction since the 19th century. Yet, when such sovereignty and independence of states were not in question, the Italian courts have denied immunity.³³ In Germany, the rule of sovereign immunity was said to be an integral part of the law of nations and as such precluded suits from being brought against foreign states.³⁴

The above brief survey shows that the rule of state immunity was established in the 19th century in the practice of various legal systems and incorporated in international law as an accepted and uncontested principle.

2. The So-called Doctrine of Absolute Immunity in International Practice

(a) The doctrine of absolute immunity in Anglo-Saxon practice

i. The United States:

The judicial authorities of the United States were among the first to formulate the principle of state immunity. The principle was clearly laid down by Chief Justice Marshall in The Schooner "Exchange" v. McFaddon and others (1812). The facts of the case were as follows: John McFaddon and his partner, both citizens of the United States, were owners of a schooner by the name of "Exchange". On one of its transatlantic runs at Baltimore, the "Exchange" was forcibly captured on 30 December 1810 by units of the French Navy, taken to a port in France and converted into a French ship of war. The capture of the "Exchange" was apparently carried out under a decree by which Napoleon had declared a blockade of Great Britain and had ordered the capture of any ship stopping there en route to the continent. In August 1811, the "Exchange" was brought into the port of Philadelphia, under stress of whether McFaddon and his partner filed their libel in the District Court of Pennsylvania, asserting their rights of property to the vessel. The district judge dismissed the action, as suggested in court by the executive branch of the United States Government, on the ground that a public vessel of a foreign sovereign, in amity with the USA, was not subject to the ordinary judicial process of the country. From this decision the petitioners appealed to the Circuit Court, where the sentence was reversed on 28 October 1811. Then the US Attorney-General appealed to the Supreme Court. He asserted that: "Whenever the act is done by a sovereign in his sovereign character, it becomes a matter of negotiation, or of reprisals, or of war according to its importance", but the judiciary has no say in the matter. He argued that as the vessel did not come to trade, there is no implied waiver of the peculiar immunity of the public vessel, and she had committed

no offence while in the US. To begin with, he unequivocally affirmed the principle of the territorial jurisdiction of the local state as "necessarily exclusive and absolute". However, he recognized the existence of several exceptions to this exclusive and absolute jurisdiction: (1) the exemption of the person of the sovereign from arrest and detention in a foreign territory; (2) the immunities which all the civilized nations allowed to foreign ministers; and (3) the implied cession of a portion of its territorial jurisdiction where the sovereign state allows the troops of a foreign prince to pass through his dominion. According to Chief Justice Marshall:

All exceptions ... to the full and complete power of a nation within its own territory must be traced up to the consent of the nation itself. They can flow from no other legitimate source. 35

In his judgement, he based the immunity accorded to a foreign sovereign on the attributes of sovereign states, including especially independence, sovereignty, equality and dignity of states. He declared:

The full and absolute territorial jurisdiction being alike, the attribute of every sovereign and being capable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights, as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or his sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication and will be extended to him.

He further observed:

This perfect equality and absolute independence of sovereigns and this common interest impelling them to mutual intercourse and an interchange of good offices with each other, is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation. 36

It is clear from this judgement that the doctrine of sovereign immunity has been expressed as an exception rather than a rule. Chief Justice Marshall has invoked the theory that the territorial

state was understood to waive the exercise of a part of its exclusive territorial jurisdiction when a foreign sovereign or his sovereign rights would otherwise be subject to that jurisdiction, and on that basis a sovereign was entitled to expect that on entering the territory of another state his immunity would be respected. Nevertheless, the decision drew a distinction between the situation of a vessel that visited a foreign port in the course of its normal activities and that of a military detachment whose presence in a foreign territory was subject to the express consent of the receiving state. Sir Ian Sinclair expresses the view that the Schooner Exchange judgement did not espouse any doctrine of absolute immunity. He observes that:

Chief Justice Marshall's judgment is in no way inconsistent with the theory that immunity may extend only so far as to secure the protection of the 'sovereign rights' exercisable by a foreign sovereign. 37

In similar reasoning, Mr Badr points out that Chief Justice Marshall did not envisage a blanket immunity for the sovereign state as a general rule, to which exceptions should be made to permit the exercise of the local state territorial jurisdiction.³⁸ The same writer concluded, after a careful examination of the decision that:

the schooner Exchange can be rightly said to be the harbinger of the restrictive theory of immunity, rather than, as commonly maintained, the starting point of an absolute theory. 39

Nevertheless, the United States courts placed a different emphasis on that judgement. In the United States judicial practice, the doctrine of "absolute immunity" was commonly thought to derive from the judgement of Mr Justice Van Devanter in the case of Berizzi Bros. Co. v. SS "Pesaro" (1926), in which the court declined jurisdiction in a suit involving a trading vessel owned and operated by the Italian Government and engaged in the carriage of olive oil to the United States. Mr Justice Van Devanter in this case made the statement that the principles laid down in the Schooner Exchange:

are applicable alike to all ships held and used by a government for public purposes, and that when, for the purpose of advancing the trade of its people, or providing revenue for its treasury, a government acquires, mans and operates ships, they are public ships in the same sense the warships are.

He goes on to declare that:

We know of no international usage which regards the maintenance and the advancement of the economic welfare of the people in time of peace as any less a public purpose than the maintenance and training of a naval force. 40

The Supreme Court in this case refused to adopt the suggestion of the State Department that immunity should not be accorded to a vessel employed by foreign governments in commercial operations.⁴¹ The dual personality of the state was rejected by the Supreme Court in this case, for unlike sovereigns and ambassadors, states could act only in their public and sovereign capacities and thus a new doctrine of unqualified immunity had been recognized.

This triumph of the Supreme Court over the executive branch of the government in matters touching foreign relations appeared to be temporary, and was attributable partly to the predominant view of American judges of that time that:

it is for the foreign government and not for the court to decide whether a merchant ship is public or private, or whether an act of the foreign government is governmental or non-governmental. 42

However, a new development emerged later. There had been a strong inclination in the Supreme Court to follow the lead of the executive branch of the Government and to adopt the suggestion of the State Department in inclining to accord immunity whenever the claim of the foreign government was endorsed by the executive branch.

This new attitude on the part of some of the Supreme Court judges is reflected in some subsequent judicial decisions.⁴³ Such coordination between the judiciary and the administrative branch within the same legal system was believed to be desirable in order to avoid political embarrassment. This rationale was clearly stated by Chief Justice Stone in the following words:

it is therefore not for the court to deny an immunity which our government has seen fit to allow, or to allow an immunity on new ground which the government has not seen fit to recognize But recognition by the court of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the

protection of our national interests and their recognition by other nations. 44

In this way state immunity ceased to be a purely legal question involving application of international law per se and the suggestion of the department has exercised the strongest persuasive influence of the determination by the court in question.⁴⁵

ii. United Kingdom:

In the 18th century there was much speculation upon the position of a foreign sovereign before the English courts. During that century international lawyers were inclined to the view put forward by Mary, Queen of Scots, as against the legality of her detention by Queen Elizabeth, that a foreign sovereign was wholly immune from any territorial jurisdiction.⁴⁶ This was attributed mainly to three reasons:

(1) Though English lawyers adhered to the broad principle that the rules of international law were part of the law of England,⁴⁷ these rules gave no certain guides. They tended in the direction of asserting the immunities of a foreign sovereign; but they also seemed to say that there were some limitations upon that immunity though there was no definite agreement as to what those limitations were.⁴⁸

(2) Another source of confusion stemmed from the rules of procedure prevailing in the Court of Chancery. According to those rules, all persons in any way connected with the litigations were required to be made parties in order that the suit might be completed.⁴⁹ Not only that, but some equity judges also maintained that a foreign sovereign might be made formally a party to a suit in equity in order that the foreign sovereign might have an opportunity to assert his interests.⁵⁰

(3) Thirdly, at the opening of the 19th century, the English courts operated under separate divisions. The separation between the courts of admiralty and the courts of common law and equity was very

marked and, of course, that distinction had negatively influenced the formulation of a definite rule as to what foreign sovereign immunity was.

From this period of uncertainty the case of The Prins Frederick (1820)⁵¹ may be noted. This was a dispute involving a public ship of war owned by the King of The Netherlands. The King's advocate cited writers on international law to prove that:

foreign princes are held to come in the territory of another government under a sort of implied consent, which attributes to them an inviolability as to their persons, and exemption from the ordinary process of laws. 52

The court upheld immunity and declined jurisdiction on grounds mentioned earlier in this chapter. However, the dispute was ultimately settled by arbitration.

Another phase of the development in the English case law was represented by two cases, The Charkieh (1873)⁵³ and The Parlement Belge (1880).⁵⁴ In this period there had been a clear tendency towards more restriction of immunity. The first case involved a ship which had been engaged in a trading venture and had not been accorded immunity. Sir Robert Phillimore held that the commercial nature of the service or employment of the vessel disentitled it to state immunity. Another ground for rejecting immunity was that the ship had been owned by the Khedive of Egypt in his private capacity and had been chartered to a British subject at the time of the commencement of the proceeding. In his well-known dictum, Sir Robert Phillimore stated:

No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs obligations to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character. 55

The dictum clearly affirmed the rule of restrictive immunity which he later reiterated in the The Cybele (1877),⁵⁶ and in The Constitution (1879)⁵⁷ in which he had drawn a distinction between an American vessel of war, which had been held to be entitled to

immunity, and a public ship employed for commercial purposes which was denied immunity.

Sir Robert Phillimore went even further in the Parlement Belge case. After reviewing English and American cases, he concluded that the vessel in question was neither a ship of war nor of pleasure and thus was not entitled to immunity. His judgement was reversed by the Court of Appeal on the ground that the ship had "been mainly used for the purpose of carrying the mails". Moreover, under the bilateral treaty then in force between Belgium and the United Kingdom, packet-boats, regardless of subsidiary employment, were granted the status of public vessels for the purposes of immunity.

In delivering his judgement in the Court of Appeal, Lord Justice Brett based his decision on the ground that:

.... the ship has been mainly used for the purpose of carrying the mails, and only subserviently to that main object for the purposes of trade. The carrying of passengers and merchandise has been subordinated to the duty of carrying the mails. 58

The Porto Alexandre (1920)⁵⁹ followed that decision perhaps incorrectly. The Porto Alexandre was formerly a German privately owned vessel which had been lawfully condemned in Prize by the Portuguese Prize Court in 1917. She had previously been requisitioned and, since then had been employed wholly in ordinary trading operations. The court adopted the absolute view of immunity, although it endorsed the "theory of public property" upon which the immunity of public vessels had long been based. This decision was confirmed by the Court of Appeal with some reluctance.⁶⁰ Lord Justice Bankes felt some difficulty but deemed himself bound by the decision of the same court in the Parlement Belge case. Lord Justice Warrington was of a similar opinion.⁶¹ Lord Justice Scrutton shared the doubts expressed by Hill, J. in the court below, but denied the remedy claimed and suggested some sort of extra-legal remedies.⁶² Thus, the Court of Appeal declined jurisdiction, maintaining that their judgement in the Parlement Belge case could not be distinguished. The rule laid down in the Porto Alexandre case was admitted by the Counsel in the Jupiter

((No. 1)⁶³ without any argument and substantially followed in Compania Mercantil Argentina v. U.S.S.S.B.⁶⁴

The next phase in English case-law started with the decision in The Cristina (1938).⁶⁵ The case was believed to have dispelled any doubt about the position of the doctrine of absolute immunity under English law. The Cristina was a Spanish privately owned vessel which had been requisitioned by the Spanish Republican Government while it was in the high seas and shortly before her arrival in an English port. In giving the judgement of the majority of the Lords,⁶⁶ Lord Atkin had laid down perhaps in the widest terms ever used in an English court, the proposition that immunity applied not only when a state became a party to the proceedings, but also when those proceedings affected in any way the destination or use of property within its ownership, possession or control. He said:

.... The courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages They will not by their process, whether a sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. 67

However, Lord Macmillan cast some doubt on the decisions of The Porto Alexandre. He expressed his doubts in the following terms:

I confess that I should hesitate to lay down that it is part of the law of England that an ordinary foreign trading vessel is immune from civil process within this realm by reason merely for the fact that it is owned by a foreign state, for such a principle must be an importation from international law and there is no proved consensus of international opinion or practice to this effect. 68

From the above brief survey of English cases, a steady trend towards granting of immunity to foreign sovereigns could easily be observed, despite some judicial observations to the contrary. It is, however, important to bear in mind that the trend had originated in the United Kingdom in its imperial era and had been influenced by the immunities of the local sovereign. Account must also be taken of the extent to which English courts had historically regarded themselves as bound by the judgements of their predecessors. It is

well known that it was only within the last decade or so that the House of Lords has been freed from the strict application of the doctrine of stare decisis.⁶⁹

The House of Lords has given expression to this freedom in the Practice Statement (Judicial Precedent) 1966.⁷⁰ The rationale behind the doctrine of precedent in the practice of the House of Lords was stated by Lord Gardiner L.C. in the following words:

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as the basis for orderly development of legal rules.

The intended purpose of the new practice was to enable the House to use the power to depart from previous decisions of the House in certain cases. The Practice Statement announced that:

Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in particular cases and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of their house as normally binding, to depart from a previous decision when it appears right to do so. ⁷¹

The discretion asserted in the 1966 Practice Statement ought to be exercised according to set principles and guidelines. Lord Reid, in a series of cases decided between 1966 and 1975 articulated at least seven criteria with respect to the new freedom.⁷²

1. The freedom ought to be exercised sparingly.⁷³
2. A decision ought not to be overruled if to do so would upset the legitimate expectations of the parties who have entered into contracts or settlements or otherwise regulating their affairs in reliance on the validity of that decision.⁷⁴
3. Cases raising only the question of statutory interpretation will not be appropriate ones to consider with a view to overruling.⁷⁵
4. A decision ought not to be overruled if it would be impracticable for the Lords to foresee the consequences of departing from it.⁷⁶

5. In the interest of certainty, a decision ought not to be departed from merely because the Law Lords consider that that it was wrongly decided.⁷⁷

6. A decision ought not to be overruled if it causes such great uncertainty that in practice the parties' advisors are unable to give any clear indication as to what the courts will hold the law to be.⁷⁸

7. A decision ought not to be overruled if in relation to some broad issues or principles it is no longer considered just or in keeping with some contemporary social conditions or modern conceptions of public policy.⁷⁹

It is in relation to the last principle that the new freedom is highly relevant as far as cases involving matters of foreign sovereign immunity are concerned. The need to avoid injustice in a particular case is expressly stated in the Practice Statement itself as justifying the use of the power to overrule. Indeed there is a fundamental lack of justice which arises from application of the absolute immunity doctrine in a particular case. Lord Wilberforce makes this point in 1 Congresso del Partido when he explains, "It is necessary in the interest of justice to individuals having ... [commercial or other private law] transactions with states to allow them to bring such transactions before the court".⁸⁰ While it is true the doctrine of sovereign immunity does not remove the legal liability of the foreign state, its application can often be tantamount to denying a remedy to the aggrieved party.

Even if the old decisions of the House of Lords covering the matter were being considered as laying down any rule of absolute sovereign immunity, the presence of manifest injustice flowing from adherence to these precedents clearly shows the need to depart from them in order to do justice to the appellant and therefore characterize the appeal as suitable for the use of the 1966 power.

(b) Opinion of writers on absolute immunity

The doctrine of absolute immunity was widely held among writers in the 19th century,⁸¹ and early 20th century.⁸² The most significant argument which has been put forward in favour of absolute immunity is that the alternative to absolute immunity is non-immunity. There is a difficulty inherent in characterizing a state's activities by reference to the distinction between private and public acts, and an objective criterion by which to draw that distinction could not be found. The argument was put by Sir Gerald Fitzmaurice in the following words:

.... The distinction between sovereign and non-sovereign acts of states is arbitrary and unreal, and one which is not easy to apply in practice and which might become much more difficult to apply if states cared to take the appropriate measures; one which, moreover, must always leave a sort of no-man's land of actions capable of being regarded as coming within either category.

He then goes on to conclude that:

.... The only sound course is to adhere to the strict doctrine of complete immunity, any departure from it in specific cases being regulated by international convention. 83

This argument seems to be influenced by the earlier practice of American and English courts which had failed to find an objective test which in all circumstances would separate questions arising jure imperii from those arising jure gestionis. The English courts, for example, had been deterred from making any distinction at all, simply because they could find no rational ground for so doing. With regard to this particular point, the Anglo-Saxon practice has offered two versions. The English courts adopted the test of public use,⁸⁴ while in the United States courts it has always been acknowledged that the doctrine of immunity has its own natural limits, namely the activities in question must relate to governmental functions.⁸⁵

The argument is also closely linked to the position held by various jurists that states are single entities and could not be broken up into parts. According to them, the economic functions of states are no less important than its other functions and states

carried on economic activities as the holders of public power.⁸⁶ In this particular regard, it should be noted that theories of states differ and there is no unanimous view that the state is indivisible. As Sir Francis Vallat has observed:

There are already examples of entities that exercise de facto and de jure sovereign powers without being states at all, and the world of the future would not consist solely of monolithic sovereign states. 87

If comparison could be drawn between private individuals and states in this regard, Sir Francis Vallat believed that the former are less readily divisible than the latter, and yet the law is capable of distinguishing between and treating differently their official and their private capacities. Thus, it would not be impossible to differentiate between various kinds of state activities. Indeed, there is an inherent difficulty to finding a workable criterion that would permit the making of the kind in question, but difficulties are by no means impossibilities.

The second argument which has been presented in favour of absolute immunity is that jurisdiction should not be exercised if there is no possibility of execution. According to this argument it would be unreasonable to admit a competence in the court which would result in an empty judgement, and due to the attributes of its sovereignty, a foreign state can never be effectively sued against its will in the courts of another state.⁸⁸ That theory had found wide acceptance in the writings of 19th-century jurists.⁸⁹

In the first place, the argument seems to be based on the distinction between right and a remedy, a distinction which is not entirely convincing. Submission to jurisdiction does not imply submission to measures of execution. In all cases the courts will have to reconsider the question of their own competence when it comes to executing the judgement rendered against a foreign state, and therefore rights and remedies are quite distinguishable and separate issues. Moreover, the validity of a judicial decision cannot be made dependent upon matters concerned with its execution. The truth appears to be that a judgement founded upon the principle

of universal justice has an effect upon the public conscience more powerful than the most effective measures of execution.⁹⁰ Therefore there seems to be no valid reason why a court could not pass a judgement concerning foreign state property simply because it would be prevented from enforcing its judgement.

In the second place, it has been argued that the doctrine of absolute immunity is based on the principle of sovereign equality of states,⁹¹ a principle which is enshrined in the United Nations Charter and confirmed by the General Assembly Resolutions.⁹² In this regard, various points must be borne in mind. Firstly, states are not only beneficiaries of immunities but are also the grantors, and the rule of state immunity is a two-way phenomenon in this regard. All states grant and enjoy jurisdictional immunities. The problem of state immunity arises where there is a conflict of sovereignties between states as a result of the presence of one sovereign authority within the jurisdiction of another. The sovereignty of a state within its own borders becomes vacuous if the pressures to which it is subjected from outside are not under legal control. To think in terms of absolute sovereignty would ultimately lead to recognition of the sovereignty of only the most powerful state.⁹³ If in such cases the problem concerns which state should prevail over the other, when both of them are equally entitled to make conflicting claims, to approach the problem from the standpoint of the sovereignty of the foreign state, is to deny another state its sovereign status which is equally valid.

There is no denying that the principle of sovereign equality of states lies at the very foundation of international law. But the principle essentially means that states have equal rights and duties and are equal partners in international relations despite any differences with respect to economic, social, political and other factors.⁹⁴ Such equality does not mean only equality of sovereign rights but also equality of sovereign duties. Since rights and duties are interdependent, the concept of sovereign equality cannot be considered in its strict sense in a situation involving state immunity. In such a situation, the conflict had to be settled in a

manner that respected the law of jurisdiction in question, failing which the equality of states would be impaired.⁹⁵ Within the context of state immunity, states are only equal insofar as they are all interested in the vindication of law. The principle of equality of states flows from the idea of sovereignty and sovereignty is not an absolute concept. As several jurists have said, one of the attributes of sovereignty is to be able to accept limitations on its exercise. Equally it is one of the attributes of sovereignty to be capable of living in the context of public international law, which necessarily implies limits on the exercise of sovereignty. Professor Brierly has commented that:

To the extent that sovereignty has come to imply that there is something inherent in the nature of states that makes it impossible for them to be subjected to law, it is a false doctrine which the facts of international relations do not support. 96

Several other lawyers have adopted a similar view.⁹⁷ Consequently the question whether one state must submit to the jurisdiction of another, or whether the second state must grant the first immunity, is essentially a practical problem associated with the nature of sovereignty.⁹⁸ Therefore it remains to be observed that the principle of equality of states cannot by itself provide an answer to the question why state immunity should be absolute, since to suggest absolute immunity is to stress the priority of state immunity over territorial sovereignty, something which runs counter to the principle of equality itself, and to international opinion. For example, in the Lotus case, in which rather similar issues had been at stake, the majority of judges in the PCIJ held that the territorial sovereignty of the state comes first and that the rights accorded to other states had to be grounded on positive rules of international law.⁹⁹ The right to exercise territorial jurisdiction was stressed by the court in that case in the following words:

International law governs relations between independent states. The rule of law binding upon states therefore emanates from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between

co-existing independent communities or with a view to achievement of common aims. Restriction upon the independence of states cannot therefore be presumed. 100

What sovereignty really connotes in inter-state relations today is a claim to independence which is theoretically tempered by the recognition of an equal claim to this by all states and by the duty and obligations not to intervene in the domestic affairs of other states. The notion of responsibility towards the smooth functioning of international legal order is implicit in any claim to such independence, for without this independence, states would come under constant threat and the claim would be worthless.

3. Rationale and Foundations of State Immunity

The theories which have been advanced to rationalize the jurisdictional immunities which foreign states have traditionally enjoyed before the courts of other territorial states may be summarized as follows.

(a) The principles of the sovereignty, independence and dignity of states

From the principles of sovereignty, independence and dignity of states the deduction is made that between two co-equal sovereign states, one cannot exercise sovereign will or authority over the other. Thus state immunity is sometimes expressed in the maxim par in parem imperium non habet.¹⁰¹ As Judge Hackworth stated:

These exemptions from the local jurisdiction are theoretically based upon the consent, express or implied, of the local state, upon the principle of equality of states in the eyes of international law 102

Again, according to this theory it would be undignified if a foreign state had to descend to litigation with private individuals. In reality, all these notions are different ways of expressing the same thing, namely, the sovereignty of the state.¹⁰³

(b) Analogy with the local sovereigns

A second basis of state immunity is to be found in the historical development of the analogy with the immunities of the local sovereigns. The theory has been advanced mainly by the courts of common law jurisdiction. In England, for example, the immunity of the crown rests upon the principle that the king cannot be impleaded in his own courts. This was understood to mean that international comity requires that a corresponding immunity should be granted to a foreign sovereign state.¹⁰⁴ The same rationale is sometimes stated in the argument that member states of a federal union are not subject to the jurisdiction of the courts of other member states. The explanation given for this view seems to be based on the idea that the entity, being a fountain of justice, no court can have jurisdiction over it.¹⁰⁵

(c) The relevance of diplomatic immunity

The prerogatives of diplomatic agents are among the oldest principles of international law. The exchange of emissaries has a long tradition. This principle, based originally upon the supposed sacred character of the herald or envoy and sanctioned by religion, was one of the oldest and most fundamental "laws of all mankind" known to the ancients.¹⁰⁶ Accordingly, it is argued that it is difficult to deny to the state what is conceded to the ambassador, for it would be absurd to accord the principal less privileges than those enjoyed by his agent. This process of analogy appears to have been adopted by the 19th-century judges when confronted with the question of sovereign immunity.¹⁰⁷

The relevance of diplomatic immunity is sometimes expressed in the expediency tempered by customary law. According to this view, the true approach to the issue of sovereign immunity is a functional rather than a theoretical one, and on this functional basis immunity should be determined.¹⁰⁸ Moreover, diplomatic immunities may be said to have provided another legal basis for state immunities, since it is well established that these diplomatic immunities are

conceded not for the benefit of the individual, but for the benefit of the state which he represents.

(d) Reciprocity and international comity

According to these precepts, the exemption of foreign states from internal jurisdiction is sometimes founded on the desire to maintain friendly relations among states. Thus Chief Justice Marshall, who seemed to be inspired by this desire, referred in his judgement to the "promotion of intercourse and an exchange of good offices dictated by humanity".¹⁰⁹ International comity was invoked by Brett, J., in the famous decision in the Parlement Belge as one of the foundations on which the rule of state immunity is established. Both the considerations of reciprocity and comity were later combined to serve as a guide for the political arm of the government to allow or disallow the immunity claimed. In the Chemical Natural Resources Inc. v. Republic of Venezuela case,¹¹⁰ the court stated that:

The State Department will recognize and suggest, or fail to recognize or grant or suggest, sovereign immunity in each case presented to it, depending (a) upon the foreign and diplomatic relations which our Country has at that particular time with the other Country and (b) the best interests of our Country at that particular time. 111

(e) Avoidance of political embarrassment in international relations

In reality this is not a separate basis for state immunity but rather is an argument deriving from the above considerations of political expediency and good inter-state relations. For the purpose of contributing to the smooth functioning of the country's foreign policy, the court of law should refrain from exercising jurisdiction or passing judgement which might upset the country's foreign relations, especially on those matters that are better reserved for political negotiations.¹¹²

(f) Other bases

The theory of extraterritoriality has sometimes been put forward as an argument for exemption of foreign states from territorial jurisdiction. The theory developed mainly to deal with the issues of immunity if the subject matter involved is sovereign property rather than that of personal sovereign. According to this fiction, the subject-matter of a claim must be regarded as physically and legally outside the orbit of jurisdiction of the territorial state.¹¹³

Apart from the theoretical basis of extraterritoriality, the power of execution of a judgement rendered against a foreign state encountered a difficulty of a practical nature. For example, execution of a judgement implies the presence of some property upon which the execution may be levied. This and other practical difficulties are often advanced as valid considerations for the local courts to abstain from assuming jurisdiction.¹¹⁴

4. Evolution in Legal Analysis gave rise to the Trend toward a Restrictive Immunity

There is no surprise about the predominance of the doctrine of absolute immunity in international practice in the 19th and beginning of the 20th century, if we accept the fact that most of the customary rules of international law regarding rights and duties of states were developed in the 19th century and based on the then existing division of state and individual activity.

During that period certain activities were carried out undeniably as state functions: internal administration and judicial ordering, control of the police and armed forces, as well as the conduct of foreign relations. Trade and industry, on the other hand, was peculiarly the province of private persons and enterprises. But this division did not remain so shortly before World War I. State functions were increased and began to extend to

the areas traditionally reserved for private individuals. These state activities were often carried out by institutions, though subject to some direction by governments, but, on the other hand, each was equipped with independent resources and management of its own: "a corporation clothed with the power of government but possessed of the flexibility and initiative of private enterprise".¹¹⁵

States have often ventured into activities like banking, railways, postal services and other enterprises which produce revenue and can be also be carried on by private groups. There were numerous reasons for such a remarkable expansion of state functions. Among these were the political and economic necessities: one of the motives of such expansion is the indispensable need in developing countries to intervene in the interest of the general development of the country, in ventures which private capital is either not willing or not able to launch.¹¹⁶ It is to that end that developing countries engage in international trade. The governments of these countries import or export simply because they alone are capable of engaging in such activities in view of the amount of capital involved and guarantees required. Furthermore, in the majority of these countries it would be true to say that state activities are controlled by efforts to establish and maintain a standard of subsistence. Accordingly, the governments created public entities for the procurement of food supplies and medicine, acted as maritime carriers to save shipping costs and formed various sub-divisions and companies to act as commercial agents. The overriding purpose in most cases is to provide a service to the public as a whole or to generate public revenue for the general good. Unless such activities, for example, transportation or large public work, are undertaken by a state, the public in those countries would be denied the benefits and facilities accruing from them.

As far as independent industrialized states in the 19th century are concerned, perhaps the explanation for the expansion of state functions lies in the speedy development in technology and the emergence of the world economy as such. In order to effectively

perform certain economic activities, like postal communications etc., a framework of international cooperation was created, and a prerequisite to that cooperation was that the state, in order to make the generally agreed rule effective within their national boundaries, would undertake certain functions.

Other important motives were defence and strategic considerations. The emergencies of war have produced in most countries public institutions designed to administer and regulate vital production and supply. The USA Shipping Board was thus recognized to buy, build and operate merchant vessels upon America's entry into World War I.¹¹⁷ A third motive was the belief that transference of public utilities such as the supply of electricity, gas and water, to the control of the state, would facilitate the economic expansion of the state as well as offering large scale operations without any injury being caused to the private monopoly.¹¹⁸

The growth of state interference in trade and commerce in the West and the eradication of private capitalism in the East has had consequences in the field of state immunity that could not have been foreseen by the very able judges who laid down the basic rule of state immunities in the 19th century. The following observations are intended to highlight some of the consequences brought about by these developments in the field of state immunities.

5. The Paradoxical Consequences of Absolute Immunity

The first argument advanced against the adherence, on the part of some states, to the doctrine of absolute immunity is that it is a quite unsatisfactory state of affairs if we realize that companies conducting identical commercial operations, but under private ownership, could be sued. It is doubted whether this distinction has any rationale or is a necessity to the international intercourse and cooperation among states.¹¹⁹ Both cases are strikingly similar: their fundamental essence is contract. If absolute

immunity is resorted to by the judicial authority of the territorial state, inequities are manifestly produced and those dealing with state traders may be placed in a disadvantageous position. The sovereignty of the foreign state, which is often cited as the basis of the absolute nature of state immunities, has nothing to do with the impact of bargaining power on the formation of contract. Lord Wilberforce makes this point best in 1 Congresso del Partido when he explained that:

To require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of state. It is, in an accepted phrase, neither a threat to the dignity of that state, nor any interference with its sovereign functions. 120

Another serious consequence is the question of uncertainties - the problem of businessmen and their lawyers - in domestic transactions, which become more acute in international transactions. For the international trader, the problem is not merely the competence of a particular judicial body, but rather the complete absence of any satisfactory forum for the settlement of disputes and redress of wrongs. This explains why the doctrine of absolute immunity was looked upon as archaic in conception,¹²¹ if it was taken from the standpoint of functional jurisprudence. Lord Wilberforce has also emphasized this requirement of fair dealing when he noted that: "It is necessary in the interest of justice to individuals having [commercial] transactions before the courts".¹²² From the standpoint of traditional equity, the doctrine was seen as discriminatory in application. When foreign states establish their commercial enterprises, there is an offer to the public at large to persuade them to deal with those corporations, assuring the former that they can rely on the promises of such enterprises and the enforceability of those promises.¹²³

Another evolution in legal thought which gave rise to the rejection of absolute immunity and the subsequent emergence of restrictive immunity is that national enactments were adopted by various countries to remove the immunity of a local state from civil liabilities in contract and tort. To mention but two of these

examples: The United States Federal Tort Claim Act of 1946¹²⁴ was issued to deny the immunity of the United States in civil suits for its wrongful acts arising from torts, with minor exceptions. Similarly, the United Kingdom Crown Proceedings Act 1947 removed the immunity of the Crown in proceedings relating to liabilities in tort cases. This trend to subject the forum state to local jurisdiction is also observable in continental Europe, although in a different institutional framework. For example, under the French legal system, proceedings could be instituted against the French Government before the various Tribunaux administratifs. A distinction has been drawn between 'actes d'autorite' subject to the competence of these tribunals and 'actes de gouvernement' which are not so subject.¹²⁵ Moreover, some Western powers like the U.S. and Britain and other major industrial powers have repeatedly declared wrongful the taking of any property of an alien if the taking is not for public purposes, is discriminatory in character, or if it is not accompanied by prompt, adequate and effective payment of compensation. In such circumstances the doctrine of absolute immunity can be used to exempt those state enterprises from paying the compensation that would otherwise be judicially collectable. As long as this unfair burden is allowed to exist, more businessmen will shy away from transactions with foreign governments and thus will hamper the expansion and flourishing of foreign trade, which is an essential element in present international cooperation, peace and co-existence.

From a political point of view, some Western countries feared that state trading was a new instrument for Communist penetration.¹²⁶ Centralized economic planning and state trading monopolies moreover facilitate the manipulation of foreign trade. It was believed that pricing and product selection could be made without regard to foreign factors. Some Western officials have labelled such tactics as 'economic political offensives in the commodity markets of the world'.¹²⁷

Some of the preceding observations tend to confirm that the rules of absolute immunity, although they have always been developed as a legal concept in a legal context, are so mingled with economic and political issues that it becomes very difficult in the final analysis to separate them from each other. With the increase in exploitation of natural resources, the promotional economic development activities of states and their agencies, and financial transactions relating to economic development objectives, the economic strand is becoming more pronounced. In consequence of these developments and in the context of the problems resulting therefrom, there has been recorded progress in international practice away from the absolute formula, a progress focusing on worldwide conditions, of which a general account will be presented in the next chapter.

References - Chapter One

1. Alberico Gentili, "De Legationibus Libri Tres" (1594), reproduced and translated in the Classics of International Law, Carnegie Endowment for International Peace (New York: Oxford University Press, 1924), Vol. II, Book II, Chap. XVI, p.106.
2. Ibid.
3. Hugo Grotius, "De Jure Belli Ac Pacis Libri Tres" (1646), The Classics of International Law, (Oxford: Clarendon Press, 1925), Vol. II, Chap. XVIII, Sec. IV, at p.443.
4. Cornelius Van Bynkershoek, "De foro legatorum tam in causa civili, quam criminali, liber singularis" (1721), The Classics of International Law, ibid. (Oxford: Clarendon Press, 1946), Chaps. XIII-XVI; and regarding the immunities of foreign sovereigns and their property, ibid., Chaps. III and IV.
5. See ibid., Chap. III, pp.18-9. In his time it was believed that rulers did not very often go travelling in the realm of other princes, and still less frequently commit crimes, enter into contracts or incur debt there.
6. Emeric de Vattel, "Le droit de gens, ou principes de la loi naturelle (1758)", The Classics of International Law (Washington, DC: Carnegie Institution of Washington, 1916), Vol. III, Book IV, Chap. VII, para. 108.
7. However, Vattel recognized the principle of independence, sovereignty and equality of states, ibid., Vol. I, Book II, Chap. III, para. 36, and the immunity of the local state from the jurisdiction of its own courts, ibid., Chap. XIV, para. 214.
8. "De foro legatorum", op. cit., Chap. IV, p.24.
9. Vattel was repeatedly cited by opposing counsels in the Schooner Exchange (1812) 7 Cranch, 116, on various occasions but nothing of his opinion on the immunities of public ships of war - which was the main issue before the court - is mentioned.
10. See G. M. Badr, State Immunity: An Analytical and Prognostic View (The Hague: Martinus Nijhoff Publishers, 1984), p.9.
11. Ibid., p.9.
12. S. Sucharitkul, State Immunities and Trading Activities in International Law (London: Stevens & Sons Ltd., 1959), p.4. See also the Report of the Working Group on Jurisdictional Immunities of States and Their Property, YBILC (1978), Vol. II, Part Two, p.154; and the Second Report of Mr S. Sucharitkul, in his capacity as Special Rapporteur on the subject to the ILC, ibid., II, (1980), Part One, p.215, paras. 67-8.
13. Sucharitkul, State Immunities, op. cit., p.4.

14. (1815-1822) 2 Dods., p.451.
15. (1851) 17 Q.B., p.171.
16. Ibid., p.207.
17. (1880) 5 P.D., p.197.
18. Ibid., pp.214-5.
19. [1938] A.C., p.458; A.-D. (1938-40), No. 86.
20. [1938] A.C., at p.490.
21. See S. Sucharitkul, State Immunities , op. cit., p.6.
22. Thus in Nathan v. Commonwealth of Virginia (1781), Dallas, p.77, the State Court of Pennsylvania held Virginia to be a sovereign independent state; also in Ware v. Haytton, ibid., Vol. 3 (1796), p. 199, Chase J. said: "A declaration not that the united colonies jointly in a collective capacity were independent states , but that each of them was a sovereign and independent state".
24. Principality of Monaco v. Mississippi, cited in G.H. Hackworth, Digest of International Law (Washington, D.C.: U.S. Government Printing Office, 1941), Vol. II, p.402.
25. See generally, Rougus Jones, The Supreme Court (Princeton: Princeton University Press, 1924); Pierce Butler of South Carolina said on the Federal Convention that he considered the interests of the Southern states "to be as different as the interests of Russia and Turkey". See the Records of The Federal Convention by Max Farrand (Washington, 1910), Vol. III, p.208.
26. See generally E.W. Allen, The Position of Foreign States Before French Courts (New York: The Macmillan Co., 1929), esp. pp.1-3.
27. Spanish Government v. Cassaux, cited by Allen, ibid., pp.3-7.
28. Solon v. The Egyptian Government, ibid., p.3.
29. See C.J. Hamson, "Immunity of Foreign States: The Practice of the French Courts", BYBIL, 27 (1950), p.301.
30. See Demangeat, note on Foelix's Treatise on Private International Law (Paris, 1866), 4th ed., Vol. I, p.419, where he argued that, since the motive of immunity was reciprocal independence, this was only true of a state acting in its sovereign capacity; that a state's independence was not necessarily sacrificed by a suit before a French court.
31. See E.W. Allen, The Position of Foreign States Before Belgian Courts (New York: The Macmillan Co., 1929), p.4.

32. Cited by Allen, ibid., p.5; see also Erik Suy, "Immunity of States Before Belgian Courts and Tribunals", ZaoR, 24 (1966), pp.660-92, at p.665.
33. See Sucharitkul, State Immunities, op. cit., pp.333-41; see also his Second Report, op. cit., YBILC, 1980, Vol. II, Part One, p.218, para. 81.
34. In Germany, legislation was passed conferring on the Minister of Justice the power to execute certain measures ordered by the courts in 1819. The Minister declined to execute an order of sequestration duly passed by a German court against a foreign government, basing his refusal on the general principle of sovereign immunity recognized by international law. See E.W. Allen, The Position of Foreign States Before German Courts (New York: Macmillan Co., 1928), pp.1-3.
35. (1812) 7 Cranch, p.116, at p.136
36. Ibid., at p.137.
37. I. Sinclair, "The Law of Sovereign Immunity: Recent Developments", RDC, 167 (1980-II), pp.117-284, at p.122.
38. G. Badr, State Immunity, op. cit., p.13.
39. Ibid.
40. 271 U.S., p.562, at p.574.
41. A suggestion made by the Secretary of State Lansing in his letter of 8 November 1918 to Attorney-General Gregory. In his reply of 25 November 1918, the latter refused to adopt the suggestion stating: "The Department of Justice is convinced that, as the law now stands, these ships are immune". See Hackworth, Digest, op. cit., Vol. II, pp.429-30.
42. See The Roseric (1918), 245 F.R., p.154.
43. See, e.g., Ex parte Peru case, 318 U.S., p.587; Republic of Mexico v. Hoffman, ibid., Vol. 324 (1945), p.30, where the Supreme Court endorsed a suggestion filed by the State Department recognizing immunity in proceedings involving Peruvian and Mexican Governments. On this new development, see A.B. Lyons, "The Conclusiveness of the Suggestion and Certificates of the American State Department", BYBIL, 24 (1947), pp.116-141.
44. Republic of Mexico v. Hoffman, supra, pp.35-6.
45. It is interesting to note in this particular regard that there had never been a time when the United Kingdom Foreign Office had made a suggestion of immunity to a court of law. The Foreign Office was merely prepared to certify to certain facts peculiarly within its knowledge, and in no sense suggested that

immunity should be accorded to foreign governments. See Sir Ian Sinclair, YBILC (1983), Vol. I, p.96, para. 28.

46. See Calendar of Scottish Papers, 1574-1581 (Edinburgh: H.M. General Registrar House, 1907), Vol. V, Introduction; W.S. Holdsworth, A History of English Law (London: Methuen & Co., 1924), 3rd ed., Vol. IV, p.45; Sir R. Phillimore, Commentaries Upon International Law (London: Butterworth, 1822), 3rd ed., Vol. II, pp.136-9.
47. See Holdsworth, op. cit., Vol. X, pp.370-3.
48. Phillimore, op. cit., Vol. II, pp.140-2.
49. For the history of these rules see Holdsworth, op. cit., Vol. XIV, p.58.
50. Duke of Brunswick v. King of Hanover, 6 Beav., p.1, at p.6.
51. 2 Dods., p.451.
52. Ibid., at p.458.
53. (1873) L.R. 4A. & E., p.59.
54. (1880) 5 P.D., p.197.
55. (1873) L.R. 4A. & E., at pp.99-100.
56. (1876-7) 2 P.D., p.244.
58. Ibid. (1880) 5, p.220.
59. Ibid. (1920), p.30.
60. Ibid., at p.34.
61. Ibid., at pp.35-6.
62. Ibid., at pp.38-9.
63. Ibid. (1924), p.236.
64. (1924) 40 T.L.R., p.601; A.-D. (1923-24), No. 73.
65. [1938] A.C. 458. On comments on the case, see H. Lauterpacht, "The Cristina", LQR, 54 (1938), pp.339-44; F.A. Mann, "Immunity of Foreign States", Mich.L.R., 2 (1938-39), pp.57-62; R.Y. Jennings, "Recognition and Sovereign Immunity", BYBIL, 19 (1938), pp.243-9.

66. Lord Maugham was prepared to subject the *Cristina* to the jurisdiction of the English courts had she been a vessel employed by the Spanish Government in commercial voyage. Two of the Lords (Thankerton and Macmillan) reserved their views as to whether the decision of the Porto Alexandre was correct. [1938] A.C., p.498.
67. [1938] A.C., at p.490.
68. Ibid., p.498.
69. See the statement of Sir Francis Vallat, YBILC (1971), Vol. I, 1655th meeting, p.69, para. 35. The question of precedent was also central to the approach of both Lord Denning, M.R. and Shaw, L.J. in Trendtex Trading Corp. v. Central Bank of Nigeria [1977] Q.B. 529, at p.554 and pp.578-9 respectively. Note also that Lord Denning's statement in Trendtex received the seal of approval of the House of Lords in Alcom Ltd. v. Republic of Colombia [1984] 2 W.L.R., p.750 at p.753.
70. [1966] I.W.W.R., p.1234.
71. Ibid.
72. When the perception of his colleagues is examined Lord Reid appears to have represented the dominant consensus amongst them. For a valuable survey of the attitudes of the other Lords, see A.A. Paterson, "Lord Reid's Unnoticed Legacy - A Jurisprudence of Overruling", Oxford Journal of Legal Studies, 1 (1981), 375-90, at pp.377-80.
73. See Jones v. Secretary of State for Social Services [1972] A.C.944.
74. See Ross Smith v. Ross Smith [1963] A.C.280.
75. See Jones case supra, at p.966. See also G. Maher, "Statute interpretation and overruling in the House of Lords", Statute Law Review (1981), 85-93.
76. See D.P.P. v. Myers [1965] A.C.435, at p.455.
77. See Knulier v. D.P.P. [1973] A.C. 435, at p.455.
78. See Jones case supra, p.966.
79. See Jones case ibid., and more generally his dicta in Conway v. Rimmer [1974] A.C.479, at pp.533, 535.
80. [1981] 3 W.L.R. at p.336.
81. Old adherents to the doctrine of unqualified immunity include C.F. Gabbia, W.B. Lawrence and J.G. Bluntschilli. For these writers, see Sucharitkul, *State Immunities and Trading Activities*, op. cit., p.259, n.4.

82. The partisans of absolute immunity in this period include Westlake; see J. Westlake, A Treatise on Private International Law (London: Sweet & Maxwell, 1922), pp.256 et seq; Cobbett, see P.E. Cobbett, Cases on International Law (London: Sweet & Maxwell, 1947), vol. I, pp.102-104; Fitzmaurice, see G. Fitzmaurice, "State Immunity from Proceedings in Foreign Courts", BYBIL, 14 (1933), pp.101-24.
83. Fitzmaurice, ibid., p.124.
84. See, for example, the Parlement Belge supra. In this case the concept of immunity has been qualified by that of public use, a qualification that has been somewhat ignored in later cases as discussed above.
85. See, for example, the Pesaro case (1925), discussed above.
86. Among the early writers who shared this view was Hyde, see C.C. Hyde, International Law as Chiefly Interpreted and Applied by The United States (Boston: Little, Brown & Co., 1922), Vol. I, pp.428-62. Almost all the writers from Eastern countries adhered to the same proposition. See, for example, Ushakov's Memorandum, op. cit., paras. 12-16.
87. YBILC (1979), Vol. I, 1575th meeting, para. 19.
88. Fitzmaurice, op. cit., at pp.120-4.
89. See, for example, the French Gabba, cited by Sucharitkul, State Immunities, op. cit., p.262.
90. Ibid., p.263.
91. See Ushakov's Memorandum, op. cit., paras. 5-7.
92. For example, The Resolution on Principles of International Law concerning Friendly Relations and Co-operation among States, General Assembly Resolution 2625 (XXV) of 24 December 1970, annex.
93. See Statement of Mr Quentin-Baxter, YBILC (1983), Vol. I, 1769th meeting, para. 35.
94. See The Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation Among States, GAOR, 25th Session, Supp. No. 18 (A/8018), (New York, 1970), paras. 30-32.
95. Sir Ian Sinclair has observed in this connection, in reply to Mr Ushakov's argument, that the argument appeared to consider only the interest of the acting state, a state endowed with attributes of sovereign powers and clothed in the impenetrable armour of immunity, completely ignoring the interests of the territorial sovereign. See YBILC (1985), Vol. I, 1922nd meeting, p.268, para. 20.

96. J.L. Brierly, The Law of Nations (Oxford: Clarendon Press, 1955), 5th ed., p.48.
97. For example, Professor Garner declares that: "In its present state of development, the absolutist conception of sovereignty, viewed in its external manifestations, is wholly incompatible with the existence of that society and it ought to be abandoned along with that other useless fiction known as the equality of states". See J.W. Garner, "Limitations on National Sovereignty in International Relations", APSR, 19 (1925), p.20. See also Leon Dugit, "The Law and the State", Har.L.Rev., 31 (1917-18), p.1. Laski's denunciation is much stronger. According to him, the notion of an independent sovereign state, on the international side, is incompatible with the interests of humanity. See H.J. Laski, The Grammar of Politics (London: George Allen & Unwin, 1925), pp.44-89.
98. See on this point Sir Francis Vallat, YBILC, I (1981), 1655th meeting, p.69, para. 33.
99. Judgement No. 9 of 7 September 1927, PCIJ, Series A, No. 9.
100. Ibid., p.18.
101. See Chief Justice Marshall in the case The Schooner Exchange v. McFaddon *supra*; the Parlement Belge (1880) 5 P.D. 197; Re Hanukiew, A-D. (1933-34) Case No. 66.
102. Hackworth, Digest of Public International Law, *op. cit.*, Vol. II, Chapter VII, p.393, para. 169.
103. See e.g., Ian Brownlie, Principles of Public International Law (Oxford: Clarendon Press, 1979), 3rd ed., p.326.
104. See The Porto Alexandre (1920), P. pp.21, 30, 54, 65.
105. See the cases of Principality of Monaco v. Mississippi and Kawanankoa v. Polybank, *supra*.
106. Among the ancients, the rules of intercourse among nations were founded on a religious premise. See W.B. Lawrence, Preface to the 3rd ed. of Wheaton, Elements of International Law, Boston, 1863); for diplomatic relations in ancient Greece and Rome, see Coleman Phillipson, The International Law and Custom of Ancient Greece and Rome (London: Macmillan and Co., 1911), Vol. I, Chap. XIII, pp.302-46. The ancient Hindus also had a similar system; see K.R.R. Sastry, The Ancient Indian States and International Law (Allahabad: Kitabistan, 1920), Chap. 8, pp.115-32. In early Islam, though not based on the institution of permanent embassies in the modern sense, diplomatic relations nevertheless attained a very high state of development. The rules of diplomatic immunity in the Islamic legal system will be examined later in Part III of this study.

107. See De Haber v. The Queen of Portugal (1851) where Lord Campbell, C.J. stated: "... the sovereign himself would have been considered entitled to the same protection, immunity and privilege as the minister he represents" (1851) 17 Q.B., pp.207-208. Lord Langdale M.R., while observing that the position of a foreign sovereign and an ambassador are not identical, yet stated that the reasons for the immunities of a foreign sovereign are as strong, if not stronger, than the reasons for the immunities of ambassadors, in Duke of Brunswick v. The King of Hanover (1844) 6 Beav. 1.
108. Lord Denning addressed the argument in Rahimtoola v. Nazim of Hyderabad where he drew a distinction between matters which, in the interests of diplomacy, should not be made a subject of legal proceedings and those which justice requires should be subject to legal proceedings [1958] A.C., 379, at pp.411-24.
109. (1812) 7 Cranch, at p.136.
110. Reported in AJIL, 60 (1966), p.338.
111. Ibid., at p.843.
112. See Sucharitkul's Second Report, YBILC (1980), Vol. II, Part I, p.229, para. 124.
113. See O'Connell, International Law, (London: Stevens & Sons, 1970), Vol. II, 2nd ed., p.843.
114. See Sucharitkul's Second Report, op. cit., p.229, para. 126, where he observed that the decision of the court should be regarded as valid irrespective of the impossibility or difficulty of execution.
115. This definition was given by President Franklin Roosevelt in his message to Congress in 1933, recommending the formation of The Tennessee Valley Authority. Quoted in W. Friedman, The Public Corporation (London: Stevens & Sons Ltd., 1954), p.541.
116. Ibid., pp.542-3.
117. See Harvard International Law Bulletin 1-3, Vol. III, p.1.
118. W. Friedman, The State and Rule of Law in a Mixed Economy (London: Stevens & Sons, 1971), p.54. The main political driving force behind this policy has been the public ownership policies of successive labour governments. On this point see E. Eldon Barry, Nationalization in British Politics, The Historical Background (London: Jonathan Cape, 1965).
119. Sigmund Timburg, "Sovereign Immunity, State Trading, Socialism and Self-Deception" in Essays on International Jurisdiction, Richard A. Falk and Robert J. Nordstorm (eds.), (Ohio: State University Press, 1961), pp.40-73, at pp.42-6.
120. [1983] 1 A.C., p.244, at p.262.

121. See Timburg, op. cit., p.45.
122. 1 Congresso Del Partido, supra, at p.262.
123. Timburg, op. cit., p.45.
124. Text in USC, Vol. 28, Sec. 2680(a).
125. See E.W. Allen, The Position of Foreign States Before National Courts, Chiefly in Continental Europe (New York: Macmillan & Co., 1933), p.5.
126. See generally B. Fensterwarld, "U.S. Policy Towards State Trading", L.Cont.Pro., 24 (1959), pp.369-79.
127. Ibid., p.372.

CHAPTER TWO

THE RECENT LEGAL DEVELOPMENTS OF THE LAW OF STATE IMMUNITY UNDER THE CURRENT CUSTOMARY LAW

I. THE EMERGENCE OF THE RESTRICTIVE THEORY OF IMMUNITY IN THE POST-WAR ERA

So far we have been considering the origin of the rule and the doctrine of what is called 'absolute immunity'. The reasons have already been given for the emergence of the restricted view of immunity in the process of the development of the law, and it must be emphasized that international trade has played a major role in this development.

With ever-increasing functions of the state in the economic sphere, particularly in international trade, it was becoming more and more questionable to continue to adhere to the doctrine of 'absolute immunity'. The restrictive view of immunity has since been more fully developed, and to that development we may now turn. The evidence of the development of the rule is to be found in state practice, the decisions of national courts, treaties that virtually legislate or codify existing practice, the works of several private and governmental bodies composed of delegates vested with the task of codifying the law, and the writings of jurists in international law.

1. The Development of the Law in the USA

(a) The balance between executive and judicial responsibility

Some of the United States judges realized that allowing or withholding of sovereign immunity might affect the foreign relations

of their country, so they turned to the State Department, the organ charged with conducting those foreign relations. When one of its government agencies is sued, the foreign state presents a note to the State Department which, upon reviewing the note, either transmits or declines to transmit to the court the so-called 'suggestion' or 'certificate'. Upon receipt of such a document, the court is expected to accept it, and is thus discharged of its burden to decide something that might otherwise upset or embarrass US foreign relations.¹ If the certificate suggests that immunity should be granted, the court is likely to acquiesce and follow the suggestion. For example, Chief Justice Stone's statement in the case of Republic of Mexico v. Hoffman may be quoted:

It is therefore not for the courts to deny an immunity which our Government has seen fit to allow, or to allow an immunity on new grounds which the Government has not seen fit to recognize. 2

But since the judiciary is normally, in theory as well as in practice, independent of the executive in matters of adjudication according to the constitutional doctrine of separation of powers, it seems that the decisions of the courts do not necessarily follow the same lines as the conclusion reached by the executive branch of the government.

The weight of persuasiveness of such a suggestion has been a matter of considerable controversy. A better view appears to be that the authoritativeness of the department certificate very much depends on the prevailing attitude of the court at the material time.³

(b) The Tate Letter

The decisive point in any efforts to substitute the doctrine of absolute immunity in United States' law was the letter issued by the State Department on May 19, 1952, commonly known as the Tate Letter. It was in substance a statement by the acting legal adviser to the State Department identifying certain areas of activities where immunities should be recognized and allowed. The letter stated that:

.... It will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity. 4

The Tate Letter was uniformly welcomed by international jurists when it appeared,⁵ and received favourable acceptance by the US Supreme Court in The Republic of China case.⁶ In essence the letter was to the effect that foreign governmental agencies engaging in governmental acts were immune from suits in US courts, while agencies engaging in commercial transactions were not so immune. An examination of the letter would show that the view of the State Department was based on the following legal considerations: i- the misuse of the doctrine of absolute immunity by the Soviet Union and its bloc; ii- the injustice of relieving foreign governments from liabilities to which the US government and its organs are subject; and iii- the inequities of leaving private claimants remediless in their relations with foreign government enterprises.

The major preliminary point to notice about the letter is that the new policy of the Department was intended to affect only immunity from jurisdiction. The immunity of foreign governments from measures of execution remained for the Department absolute. The failure to apply the new policy to execution of judgements rendered against foreign governments cannot, it is submitted, be justified on the basis of legal logic. The American Law Institute's Restatement of The Foreign Relations Law of the US⁷ recommends that, for the restrictive theory to be meaningful, the decisions given must be satisfied from the property of the foreign state. But generally the letter brought a return to the restrictive doctrine and any significant trace of absolute immunity had in effect been eliminated.

(c) US case-law

In the light of the foregoing developments, the question arises as to what the federal courts had been doing all this time while apparently relying on the Tate Letter. To answer this question it must not be assumed that the administrative procedure established by

the Department to give effect to the restrictive view of immunity had ousted the jurisdiction of the court. The letter was intended to ensure a higher degree of coordination between the courts and the executive branch of the government, as the lack of such harmonization might somehow seriously upset the country's political relations in certain cases. But again, the persuasiveness of the policy adopted by the Department raised a doctrinal controversy of considerable degree. It was argued that executive determination should no longer be dispositive of the issue of state immunity, and that the courts should resume their proper function in this as in other international law issues, where the interest of the government is asserted.⁸

During the period between the issuance of the Tate Letter and the entry into force of The Foreign Sovereign Immunities Act 1976 (one of the principal objects of which was indeed precisely to vest exclusively in the courts the responsibility for disposing of sovereign immunity claims), the US courts had several opportunities to render decisions on the specific issues of state immunity. To give but a few examples, in National City Bank of New York v. Republic of China⁹ the Supreme Court ruled that a foreign sovereign who instituted a proceeding in the US court could not plead sovereign immunity as a defence to a counterclaim against him, if the counterclaim did not exceed the amount of the sovereign's own claim. Mr Justice Frankfurter referred to the Tate Letter and based his decision on the "ultimate trust of the consideration of fair dealing". In other words, sovereign immunity is not absolute and considerations of fair play must be taken into account.¹⁰

In Rich v. Naviera Vacuba,¹¹ the US courts again considered the extent to which the State Department's suggestion was binding on the courts. In this case the Department had suggested immunity and requested the release of a merchant vessel owned by the Cuban Government. The circuit Court of Appeal held that it could not properly go behind the determination made by the Department and therefore dismissed the claim. Most significantly, in Victory Transport Inc. v. Comisaria General de Abastecimiento,¹² no

suggestion of immunity was filed by the State Department in favour of a branch of the Spanish Ministry of Commerce. The court treated the decline of the State Department as highly crucial and denied the claim of immunity that had not been allowed by the Department.

A further illustration of this tendency on the part of the American courts can be furnished by the case of Amkor Corporation v. Bank of Korea¹³ in which the court accepted as binding on it, the determination of the State Department that the transaction entered into by the defendant bank was commercial in nature.

In 1971, the circuit Court of Appeal had to consider a very unusual set of facts in the case of J. Heaney v. Government of Spain.¹⁴ The appellant, a lawyer, claimed that he had agreed with the Spanish Government, through one of its consular representatives, to generate publicity about the alleged British suppression of civil rights in Northern Ireland, since this would be of benefit to the respondents in the context of their dispute with the British Government over Gibraltar. The respondents immediately raised the plea of immunity. The court held that the act in question clearly fell within the category of "strictly political or public acts". The argument that the making of a contract regardless of its purpose should be deemed a commercial act, was decisively rejected by the court and the plea of immunity was upheld.

The case which is often regarded as probably the most important decision of the US courts on state immunity, shortly before the enactment of The US Foreign Sovereign Immunities Act 1976, is that of Alfred Dunhill of London Inc. v. Republic of Cuba decided by the Supreme Court.¹⁵ However, it should be noted that this case basically involved issues of an act of state doctrine rather than application of state immunity rules. The result created by the overlapping of the doctrines would be rather astonishing. The court approved the argument that, since the aim of the restrictive theory of immunity is to limit sovereign immunities to governmental acts, to elevate foreign state commercial acts to a protected status would frustrate this modern development by permitting sovereign immunity

to re-enter through the back door in the guise of an act of state doctrine.¹⁶ The minority judgement agreed that the act of state doctrine should be applied to governmental acts and "should not be allowed to protect commercial acts of foreign states".

2. The Development of the Law in the UK

Since the Cristina case (1938) and the Porto Alexandre case (1920), there has been a continuing absence of English case-law upholding the doctrine of absolute immunity of states. As early as 1938, English judges began to throw considerable doubt upon the soundness of the doctrine of absolute immunity when applied to trading vessels.

The influence of these and other doubts expressed by earlier English courts¹⁷ was felt in the courts of other common law jurisdiction outside the United Kingdom,¹⁸ and is widely quoted by later judges of English courts. This influence may be illustrated by the Dollfus Mieg case (1950): in occupied France, gold bars had been seized by the Allied Forces and handed over to the Tripartite Commission for the Restitution of Monetary Gold. The ownership of the bars had not been known and they had been deposited with the Bank of England by the Governments of the UK, the USA and France. The Dollfus Mieg company instituted proceedings in the English courts against the Bank of England claiming title to the gold bars. At a later stage in the proceedings, the Governments of France and the US intervened and claimed sovereign immunity, which was duly accorded. In the House of Lords, three out of four law lords endorsed Lord Maugham's view that the doctrine of immunity should not be extended.¹⁹ The doubts propounded by Lord Maugham were shared by Viscount Simon in the decision of the Privy Council in Sultan of Johore v. Abu Bakr (1952). He was prepared to state that he did not consider that it had been finally established in English law that there was "any absolute rule that a foreign independent sovereign cannot be impleaded in our courts in any circumstances".²⁰

This case has other particularly interesting features. It places severe limits on the applicability of state immunity doctrine through the use of the concept of implied waiver. If the absence of consent is viewed as an essential element constitutive of state immunity or entailing disability on the part of an otherwise competent court, the expression of consent by the state concerned removed this obstacle to the exercise of jurisdiction.

Sir Ian Sinclair pointed out that in those jurisdictions applying the doctrine of absolute immunity, the emergence of the restrictive view of immunity was a direct product of the application of the concept of voluntary submission.²¹

The Sultan of Johore case (1952) tends to illustrate the deep concern of the English courts on the issue. The waiver of immunity was interpreted by the court in a very liberal way to the effect that, if a sovereign issues a writ, he submits to the jurisdiction of another state, in that and in all proceedings ancillary thereto. In this case the Privy Council disposed of the plea of immunity raised by the Sultan to an originating summons to set aside a Japanese court decree concerning property in Singapore. The original proceedings in the Japanese court were instituted by the Sultan and the present ones were in the nature of an appeal against the decree. The waiver of immunity was held to extend to the instant suit. The Sultan of Johore case may be contrasted with another one in which the court strictly interpreted the concept of voluntary submission. It was held in Kahn v. Federation of Pakistan²² that there was no waiver of immunity although the parties had expressly agreed in writing to submit to the jurisdiction of English courts in case of any dispute. As regards the requirement of effective submission, Jenkins, L.J., observed that the submission must be made at the time when the court is about to, or is being asked to, exercise jurisdiction over the sovereign, and not at any previous time. The court also seemed to have been influenced to a measurable extent by the practice of the Court of Chancery, according to which a court will not halt the administration of an English trust because a foreign sovereign makes a claim in respect

of the trust property, but neither will it submit his claim to the jurisdiction of the courts.

Apart from the notion of voluntary submission and the equitable doctrine of trust, the English courts seem to have placed another severe restriction on the application of the doctrine of absolute immunity when a foreign sovereign is impleaded in an action involving title to property. When the action puts at issue the title of the foreign sovereign, the latter is impleaded. It is not, however, correct to say that the sovereign is entitled to immunity upon his mere assertion that he has a right to the property which is the subject matter of the suit.²³ It is clear that the court cannot examine the issue of the claim to title but it may require proof that the claim is a valid one. The rule was laid down by the Privy Council in the case of Juan Ysmael and Co. v. Government of the Republic of Indonesia.²⁴ The appellant, a company incorporated in the Philippines, issued a writ in rem against a steamship seeking the recovery of the vessel as its owners. The Government of Indonesia applied to have the writ set aside on the ground of immunity, claiming that the government was the true owner of the vessel by buying it from an agent of the company, or was in possession or control or entitled to control the vessel. It was proved, however, that the appellant's agent had no authority to sell the vessel to the Indonesian Government, whose title was thus manifestly defective. The court held that the plea of immunity could not be sustained if the foreign sovereign is in possession of the subject matter of the action; there is some authority to the effect that the sovereign is said to be in possession only when he has the right to possess; and his right to possess will depend upon the terms of any contract which he may have made with the actual possessor.²⁵

In short, the way was open for restating and delimiting the scope of the rule because most of the old authorities had come under attack. The erosion of the absolute view in English case-law began with Lord Denning's lone dissent in Rahimtoola v. Nazim of Hyderabad.²⁶ As to the ground on which English courts based their

earlier decisions, namely the concept of sovereignty and dignity of foreign sovereigns, Lord Denning was very critical when he said:

It is more in keeping with the dignity of the foreign sovereign to submit himself to the rule of law than the claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction. In all civilized countries there has been a progressive tendency towards making the sovereign liable to be sued in his own courts; notably in England by The Crown Proceedings Act 1947. Foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign governments an immunity which we do not grant to our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is probably cognizable by them. 27

This case illustrates the difficulties involved in distinguishing between the two conceptions of 'possession' and 'control'. These difficulties have arisen and often arise in circumstances in which the line between 'possession' and 'control' is blurred. The case makes it clear, for one thing, that immunity is not to be confined to cases in which a foreign sovereign is himself technically possessed of the subject matter either directly or through his servants. It was argued that technicalities and fine points of domestic law of agency and bailment should not be allowed to exclude immunity.

The drastic revision of the doctrine of state immunity brought about by Rahimtoola's case, and the recognition of this exception of possession or ownership to that doctrine, had been somewhat accelerated by the obiter comments of Lord Denning in Thai-Europe Tapioca v. Government of Pakistan²⁸ in which the English case-law has been accurately summarized by the Master of The Rolls. He confirmed the restrictive view he had earlier proposed in the Rahimtoola's case. While accepting the general principle that: "except by consent, the court of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages", he then enumerated four existing exceptions to this general rule in English law:

first there is no immunity in respect of land situate in England
second in respect of trust funds here or money lodged for the payment of creditors
third in respect of debts incurred here for services rendered to property here
fourth, [when] a foreign sovereign enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of [English] courts. 29

Lord Denning held that the case fell within the general rule that a foreign sovereign cannot be personally impleaded in English courts and outside any 'commercial exception' since any such exception related only to disputes which "arise properly within the territorial jurisdiction of the English courts". Soon afterwards, The Privy Council had cleared the way forward in The Philippine Admiral case (1975).³⁰ Notwithstanding the anomalous distinction created between actions in rem and actions in personam, it had been held that in an action in rem against a ship owned by a state and involved in commercial activities, the state could not claim immunity from suit. The main question before the Privy Council was whether or not they should follow the decision in the Porto Alexandre case. There were weighty reasons for not following that decision:³¹ 1) their Lordships thought the decision in the Parlement Belge case bound the court to decide the "Porto Alexandre did not cover the case at all"; 2) in The Cristina three Law Lords "thought it was at least doubtful whether sovereign immunity should extend to state-owned vessels engaged in ordinary commerce"; 3) "the trend of opinion in the world outside the commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions"; 4) "their Lordships themselves think that it is wrong that it should be so applied - in this country and no doubt in most countries in the western world - the state can be sued in its own courts on commercial contracts into which it has entered and there is no apparent reason why foreign states should not be equally liable to be sued there in respect of such transactions". The distinction drawn in previous cases, concerning government merchant ships, between action in rem and action in

personam was discussed by Lord Cross who was compelled to admit that, "to apply the restrictive theory of immunity to action in rem while leaving action in personam to be governed by the absolute theory would produce a very illogical result".

The illogical result contemplated by Lord Cross of Chelsea in the above case evidently occurred soon afterwards in the facts of Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria.³² Nigeria, having huge oil-based revenue, contracted to buy large quantities of cement for the development of the country. It overbought, and the country's docks and harbours became clogged with ships waiting to unload. Unable to accept delivery of the cement it had bought, it instructed the defendant Bank not to honour a letter of credit which had been issued in favour of the plaintiff. In response to the suit thus brought, the defendant bank sought to invoke sovereign immunity. One of the main issues before the Court of Appeal was the status of the Central Bank. The Court agreed that the test to be applied was to look at the functions and control of the entity concerned. The Court placed great emphasis on the Nigerian legislation setting up the Bank as well as the evidence submitted by experts in the field. Stephenson, L.J., confined himself to holding that the Central Bank was not entitled to immunity because it was not a department of state of Nigeria.³³ Shaw, L.J., took the same view but was prepared to state further that, even if it were, "in the conditions of international relations which now prevail, the restrictive principle which has emerged is manifestly in better accord with practical good sense and justice".³⁴ Lord Denning found it difficult to decide whether or not the Central Bank should be considered in international law as a department of the Federation of Nigeria, even though it is a separate legal entity. For him, this was a secondary issue, but he was prepared to rule that the Bank should not be so considered. He preferred to rest his decision "on the ground that there is no immunity in respect of commercial transactions, even for a government department".³⁵ In this case Lord Denning had taken the opportunity to review and re-state the law concerning the ascertainment and application by English courts of customary rules



of international law. He discussed at some length rival theories of incorporation and transformation. According to the former, international law is not a foreign law for a British court, it is part of English law which the courts must judicially notice. On the other hand, the latter theory advocates that international law has no validity unless it has been accepted and adopted by domestic English law. Lord Denning preferred to follow the incorporation theory. This was that international law knows no rule of stare decisis³⁶ and hence the doctrine of absolute state immunity could no longer be considered a rule of international law.³⁷ However, the Trendtex case was settled before it reached the House of Lords, so that many issues remained unresolved.³⁸

The emerging trend away from absolute immunity reached its climax in the long overdue decision of the House of Lords in the 1 Congresso del Partido (1980) case.³⁹ The decision of the House of Lords clearly dispelled any doubts and hesitations on matters of principle. In the Court of Appeal Lord Denning differed from Goff, J., regarding the diversion of the two cargoes, viewing them not as "essentially an act of foreign policy but as essentially a repudiative breach of contract". He based his decision on the ground that: "Foreign policy afforded only the motive for the act. It did not affect the nature of it",⁴⁰ and concluded that, if a government of a country started out as a trader, it must end as a trader, and thus had no sovereign immunity.

The House of Lords, reversing the decision of the Court of Appeal (1979) and allowing the appeals, held that:

i- at the time of the transaction (before the common law was superseded by the State Immunity Act 1978), restrictions were applied to the scope of sovereignty to permit individuals with whom sovereign states had entered into commercial transactions to bring such transactions before the court; but when the act complained of was sovereign, and not a private commercial act, it could not be challenged and, in deciding into which category the act fell,

municipal courts, conforming to accepted international standards, had to consider the whole context.

ii- in accordance with those principles, the restrictive doctrine of sovereign immunity applied 1) to the case of Playa Larga, since, in taking the vessel out of Chilean waters for her own safety, no governmental authority was invoked, even though the instruction might not have been given had the owner not been the Republic of Cuba, and also 2) Lord Wilberforce and Lord Edmund-Davies dissented to the case of the Marble Islands, since the right asserted by the master to sell the perishable cargo in Vietnam was based by him on the contractual terms of the bills of lading and the law of Cuba.⁴¹ The House of Lords thus applied common-law principles as they existed before the entry into force of the State Immunity Act 1978.⁴² The case put an end once and for all to whatever doubts existed regarding the law on state immunity in English courts and tended to settle the judicial practice on the subject. It can no longer be said that the UK judicial practice supports an absolute theory of immunity to the extent that a ship used wholly for a commercial voyage would be entitled to immunity from action in rem or from arrest and detention by English courts. However, it has been argued that the assumption and exercise of jurisdiction on the basis of sister-ship jurisdiction is excessive and not free from controversy. This case brings us to the final stage at which the law stood shortly before the enactment of the United Kingdom State Immunity Act 1978.⁴³

(c) Civil law jurisdiction

The continental countries, as mentioned above, were first to adopt the principle of restrictive immunity in their judicial practice. Without exception, they based their decisions on the distinction between commercial activities and governmental activities as, since the Second World War, there had been a steady movement towards the restrictive theory of immunity. That steady progress is clearly reflected in the decisions of the late 1950s and early 1960s.⁴⁴ The states which in practice appear to have

recognized the distinction between commercial and governmental activities from the very beginning include Italy, Belgium and Egypt, which were later followed by France, Germany and other countries.

The Italian courts were the first, in 1882, to restrict the application of state immunity where the foreign state has acted in the capacity of a sovereign authority or political power, potero politico as distinguished from personal civile.⁴⁵ The public act of the foreign state was the test applied to determine the scope of state immunity. Immunity was denied in respect of private acts or acts of a private law nature.⁴⁶ The same tendency continued after the First World War. Thus, in 1925, the Court of Appeal of Genoa held the French Government responsible in respect of a contract to two certain vessels on the ground that the act was apparently one of a private law nature to be performed in Italy.⁴⁷

The post-war cases decided by Italian courts reaffirmed that judicial practice. Thus, in a relatively recent case decided in 1955 regarding a US military base established in Italy in accordance with NATO, the Court of Cassation recognized immunity in respect of public activities connected with the political functions of the US Government.⁴⁸ And the same line of reasoning was followed in later decisions.⁴⁹ However, the Italian courts considered contracts of employment as exceptions to the normal transactions between a foreign state and an individual amenable to the jurisdiction of the Italian courts.⁵⁰ The Belgian case-law, as already mentioned, was settled as early as 1875, in favour of this distinction. The commercial activities of foreign states have since been regarded by the Belgian courts as an area where no immunity will be allowed. This limitation of the rule of sovereign immunity has been consistently applied by the Belgian courts in a number of subsequent decisions up to the present date.⁵¹ Thus, the Belgian domestic court decisions are looked on as being primarily responsible for the development of the rule of restrictive immunity from jurisdiction despite some uncertainty surrounding immunity from execution. For example, the problem of immunity of government ships arises only in connection with immunity from seizure, arrest or detention, quite

contrary to the strong stand in favour of the restrictive view of immunity that has been taken by the Belgian courts in cases of immunity from jurisdiction as opposed to execution. The judicial reform on the matter was brought forward by the decision of the Brussels Court of Appeal in the case of Murua v. Pinillos et Garcia (1938),⁵² which was a direct application of the Brussels Convention of 1926 on the subject. The court permitted the arrest of a vessel employed by the Spanish Government in commercial activities.

To select another civil law country, the judicial practice of France may be mentioned. However, it should be observed that earlier French case-law was more inclined towards unlimited immunity.⁵³ However, a survey of the more recent practice of French courts will clearly show that immunity has not been accorded in all cases. Instead, several limitations have been recognized, with the result that French courts began to bring themselves into line with the Italo-Belgian practice. The first case-law attempting to qualify immunity from jurisdiction was that of Hungerford (1918).⁵⁴ Relying on the functional limitation of state immunity, the court declared itself incompetent on the ground that the vessel was employed "not for commercial purposes but for the requirement of national defence, beyond any idea of profit or speculation". But the first case to endorse the doctrine of restrictive immunity expressly was that of Lakhowsky,⁵⁵ which concerned the activities of the Swiss Office of Transport. The court held that the contract for the purchase of goods to be transported to Switzerland was a commercial transaction, and subject to the jurisdiction of the local courts. However, the Paris Court of Appeal found that a careful examination of the facts did not support the view that the contract was of a commercial nature, since it was inspired by considerations of international interest and domestic policy "excluding any profit-seeking and any idea of speculation". This decision was later followed in a number of cases where the expression 'actes de commerce' was used by the French courts to describe certain acts to "exclude any consideration concerning the exercise of the state's public authority, its independence and its sovereignty".⁵⁶ The expression 'actes de

commerce' was used by the French courts in a literal sense to mean 'commercial act' or 'trading activities'. The term was described by some French lawyers as convenient, appropriate and familiar. The term was employed by the French court in a series of cases, especially the so-called Soviet cases.⁵⁷

However firm the adherence of the French courts to the doctrine of restrictive immunity in current practice, the application of the theory of actes de commerce has been faced with cognizable difficulties in post-war case-law. A few examples will demonstrate such difficulties. In the case of Martin v. The Bank of Spain,⁵⁸ an action was brought by the appellants against the defendant concerning the marking of or exchange for new bank notes which had been recalled in Spain. The test of commercial nature was applied, though the result was to grant the immunity claimed. Again, in Guggenheim v. State of Vietnam,⁵⁹ the purchase of cigarettes for a foreign army was held to be a public act intended for public service. The same result was reached in a case arising out of a contract for the survey of water distribution in Pakistan.⁶⁰ On the other hand, a contract of commercial lease of an office for a tourist organization of a foreign government⁶¹ caused serious doubts in the minds of the judges as to the question of the determination.

It should be observed that the post-war French case-law basically adopted the view that immunity was limited only to public acts or acts performed in the interest of a public service. Immunity was determined mainly by reference to the nature of the act undertaken and not by reference to the legal personality of the agency performing it.⁶² Basing its decision on this line of reasoning, the Court of Appeal of Paris, in a recent case, gave an affirmative answer to the question whether the role of the Central Bank of Japan could be regarded as an act employed in the public service of the Japanese state. Yet the actual application of the theory produced a series of fluctuating decisions which lacked consistency and uniformity, and these are likely to continue in the future.⁶³

The effects of submission to arbitration have been recently considered by the Court of Appeal of Paris in the Pyramids case (1984),⁶⁴ where it was held that the terms of the contract binding the Egyptian Government did not imply that the Government had waived its immunity from jurisdiction. This judgement clearly shows that it is not entirely correct, as has often been suggested, that developing countries are at a disadvantage in arbitration when they are opposed by a powerful company. Going to law could be a total safeguard for the interests of foreign states involved in commercial arbitration. The decision of the Court of Appeal does not appear to be in accord with the emerging trend of restricted immunity according to which the plea of immunity should not be allowed to prevail in cases where the sovereign state has agreed to arbitrate and the jurisdiction of the court of the forum is confined to the exercise of its normal supervisory role.⁶⁵

In the same year there was some progress in terms of the legal development of French rules of state immunity and a growing tendency to bring French law closer to the law of other countries. The most important case is that of Eurodif (1984),⁶⁶ involving the Government of Iran. Although the Court of Cassation had rendered a decision on the effect of submission to arbitration similar to that given in the Pyramids case, the Court laid great emphasis on the nature of the transaction which gave rise to the dispute. In its judgement the Court stated that:

Immunity from execution benefiting a foreign state is a matter of principle, nevertheless the principle may be disregarded in exceptional circumstances; such is the case when the property attached is intended to be used for an economic or commercial activity of a private law nature upon which the claim is based. 67

This, indeed, is a sharp increase in restrictive practice. It is even a step ahead of other countries in adopting restricted immunity. The rule of execution of judgement against foreign state property was not made subject to any limitations. In other words, the rule is unqualified in the sense that it applies to both pre-judgement and post-judgement measures of execution.

The second important case is that of Sonatrach (1984).⁶⁸ It was a suit brought not against a foreign state itself, but rather against an agency of a foreign state and concerned activities conducted by that agency in the promotion of economic development of the foreign state. The foreign state agency pleaded sovereign immunity from measures of execution sought against its bank account in France. The Court withheld immunity on the ground that the instrumentality in question is incorporated as a separate entity from that of the foreign state, and that its activities are of a commercial character. The decision makes it clear that agencies other than foreign states are not generally immune from the process of execution, unless sufficient evidence is adduced to prove that the property subject matter of attachment or execution does not belong to it but to its own state, held by it on behalf of the state and intended to be used for non-commercial purposes.

In a commentary on the case,⁶⁹ it is observed that the decision was instrumental in blazing new trails in the field of sovereign immunity, in which an attempt has been made to modernize the restricted immunity of foreign states in the sensitive area of economic development. If under the United States Act, a nexus must exist between the property subject to execution and the commercial activities to which it relates,⁷⁰ the French decision has gone beyond that by subjecting the property of an entity other than a state to measures of enforcement irrespective of whether such property has been used in connection with the transaction out of which the claim arises.

The courts of the Federal Republic of Germany have adopted a contorted course of action on the subject. The doctrine of restricted immunity was recognized as early as 1885, when a German court distinguished between public and private acts and concluded that state immunity must "suffer at least certain exceptions".⁷¹ Between 1905 and 1938, the judicial practice of Germany tended to favour absolute immunity.⁷² But, following the ratification of the Brussels Convention of 1926 and its Protocol of 1934, the

restrictive view reappeared strongly in German case-law. The true mark of such an appearance was the number of cases decided under the Convention and started in 1938.⁷³ The distinction between "the exercise of sovereign rights" and "activities in private law fields" was again endorsed in 1953,⁷⁴ and was closely followed in subsequent cases.⁷⁵

The restrictive trend of immunity was confirmed in a number of recent decisions rendered by German Courts. In X v. Yugoslavia,⁷⁶ the Federal Constitutional Court held that state immunity is restricted only to acta jure imperii, and in a case involving the Iranian Embassy in Germany,⁷⁷ the court held the contract for the repair of the heating system of the Iranian Embassy to be a "non-sovereign activity" not entitled to immunity. More recently, the Federal Constitutional Courts, in a case concerning the garnishment of funds deposited in a German bank by the Embassy of the Republic of the Philippines⁷⁸ held that immunity is functionally limited to sovereign activities, although the actual result was to grant the immunity claimed, on the ground that to permit an investigation of the governmental or commercial use of the funds in question was not only impracticable, but also inadmissible, since this might interfere with the embassy's public function. The court observed that claims against a general bank account of the embassy of a foreign state, which exists in the state of the forum and the purpose of which is to cover the embassy costs and expenses, are not subject to forced execution by the state of the forum.⁷⁹

Austrian courts, after adopting the restrictive concept as early as 1919 in Austro-Hungarian Bank v. Hungarian Government,⁸⁰ and then casting some doubt on their position in a later series of cases, have relatively recently reaffirmed the restrictive doctrine. The Supreme Court handed down in 1950 one of the most elaborate immunity decisions to come from any European Court. In a suit concerning the right to use certain trademarks that had been nationalized by Czechoslovakia, the court, after an exhaustive review of all relevant sources of law, concluded that according to international law foreign states are exempt from domestic

jurisdiction only with regard to their acts jure imperii; and that according to municipal law, states are subject to the jurisdiction of Austrian courts in all disputes arising out of private law relationships. The conclusions were expressed as follows:

The Supreme Court, therefore, reaches the conclusion that it can no longer be said that under recognized international law so-called acta gestionis are exempt from municipal jurisdiction Accordingly, the classic doctrine of immunity has lost its meaning and, ratione cessante, can no longer be recognized as a rule of international law. 81

These conclusions were reiterated by other Austrian Courts.⁸²

3. National Legislation

The contribution of legislation to the development of the law is of recent growth. The importance of national legislation in this matter lies in the fact that such legislative enactments provide the legal foundation for the jurisdictional immunities of foreign states and at the same time furnish evidence as to the actual practice of states and substantive content of the law.⁸³

The preceding survey demonstrates the significance of judicial and governmental practice on the subject as indications of the direction in which the law of state immunities is progressively developing. Now, in turn, the impetus of these developments on national legislation may be briefly examined. There are several legislative texts dealing partially with some aspects of the subject, which for convenience purposes cannot be discussed here. Focus will be mainly concentrated on the special legislation on state immunities of various countries.

(a) USA Foreign Sovereign Immunities Act

Recent important example of national legislation is the Foreign Sovereign Immunities Act 1976 of the USA which came into effect on 19 January 1977.⁸⁴ The period since 1945 reflected an era of the breakdown of the traditional rule of sovereign immunity both in law

and policy. The Act sought to codify the substantive law of sovereign immunity in the US while also modifying certain aspects of it. The Act is intended to accomplish four objectives, namely:

- (1) to codify the so-called restrictive principle of immunity as currently recognized by international law;
- (2) to transfer the determination of sovereign immunity from the executive branch to the judiciary, thereby reducing the foreign policy implications of sovereign immunity determination;
- (3) to provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state;
- (4) to conform the execution immunity rules more closely to jurisdiction immunity rules.

These goals are understood by the official declaration of purposes contained in the Foreign Sovereign Immunities Act 1976, S.1602 of which states:

The Congress find that the determination by the United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgements rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the states in conformity with the principles set forth in this chapter. 85

S.1604 reaffirms the principle of state immunity and declares foreign states immune from the jurisdiction of United States courts.

Over the question of whether certain socialist country entities engaged in foreign trade as 'foreign states', the courts seem to have divergent views. In Edlow International Co. v. Nuklearna Elektrana Krsko,⁸⁶ the District Court of Columbia ruled that a Yugoslav Workers' Organization, established for the purpose of constructing and operating a nuclear power generating facility, was not a foreign state. While in Yessenin-Volpin v. Novosti Press Agency,⁸⁷ the Novosti Press Agency and the Daily World (a newspaper of the Communist Party in the USA) were held immune under the Act from libel action. The court observed the Act's definition was

"ill-suited to the concept which exists in Socialist States". The court's decision seems to have been based on the great emphasis by the court on 'state ownership'.

On this specific issue of definition of foreign states, it may be useful to mention another interesting point which the US courts had an opportunity to address: that the number of shares which a foreign state held in the corporation may be determinative of whether an entity is an agency of instrumentality under S.1063 of the Act. Thus, in Hezberger v. Compania de Acero del Pacifico, S.A.,⁸⁸ the court held that the defendant (CAP), a corporation established in Chile with 95.15 per cent of the shares owned by an entity wholly owned by the Republic of Chile, was clearly an agency of a foreign state within the purview of S.1603 of the Act, since it was a separate corporate entity and the majority of its shares were owned by a "foreign state or a political subdivision thereof".

S.1605 specifies five exceptions to the general rule of immunity. The first of these concerns commercial activities (S.1605(a)(2)) which are defined in S.1603(d) as "either a regular course of commercial conduct or a particular commercial transaction or act". If the foreign state activity is not a commercial activity, the foreign state is immune, unless an existing treaty provides otherwise.⁸⁹ S.1605(a)(2) identifies three situations of commercial activities in which non-immunity would be applied:

- (1) where the "action is based upon a commercial activity carried on in the United States by the foreign state";
- (2) where the action is based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; and
- (3) where the action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States". The "direct effect" language in this section requires the detrimental impact to be a substantial, direct and foreseeable result of an act outside the U.S.⁹⁰

It is virtually impossible within this brief survey to mention all of the cases decided under this section by the United States courts. Only a few of them will be mentioned here, focusing mainly on three important questions of determination of relevant activity, distinctions between jure imperii and jure gestionis and the question of territorial connection between the cause of action and the United States.

As to the first question, the attitude of the United States courts may be demonstrated by two cases involving a foreign state public organization. In the first case,⁹¹ the court considered applications in admiralty for limitation of liability concerning a collision in the Mediterranean between a ship owned by a New York company and another vessel owned by the Algerian Shipping Agency, CNAN. The agency operated 70 ships in worldwide service, some of them regularly visiting US ports, but the ship involved in this incident did not. Although the particular commercial activity involved in this case had no territorial nexus with the US, yet the court held that the act was based upon CNAN's worldwide shipping activities which had substantial contact with the United States. The court consequently declared itself competent under this section.

The second case was Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation,⁹² decided in 1984. The plaintiff was a Panamanian corporation that owned a vessel anchored at Algeria after a fire off Sicily, who brought an action for tortious deprivation of the vessel by CNAN. The Fifth Circuit Court of Appeals addressed the issue of whether the District Court had jurisdiction "by virtue of the unrelated continuing business CNAN does in the U.S.". After reviewing all the authorities, the court held that jurisdiction over CNAN did not exist because "there is no nexus between CNAN's commercial activity and Vencedora's claim".⁹³

Over the question of what is a 'commercial activity' depriving the foreign state from the protection of the Act, the United States courts have experienced several difficulties concerning the

distinction between jure imperii and jure gestionis.⁹⁴ A few cases will illustrate these difficulties. For example, in Arango v. Guzman Travel Advisors Corp. (1980),⁹⁵ the plaintiffs, who intended to visit the Dominican Republic on tour, were denied entry to the Republic. They then sued the travel agents, hotels and the state-owned airline of the Dominican Republic which was to provide transport. The court dismissed two counts against the airline on the ground that the latter was acting as an arm of the government and was entitled to the same immunity as the government would have been for the act of its immigration officers. However, immunity was denied in respect of the claim of breach of warranty and contract based on the non-performance of the tour and the refusal to refund the purchase price. These claims arose out of the airline's commercial activity in the US, i.e. the sale of tickets and tourist cards. The same interpretation was followed in the recent case of McDonnell Douglas Corporation v. Islamic Republic of Iran (1985),⁹⁶ where the court rejected Iran's claims of immunity in an action relating to a contract for the supply of parts for military aircraft.

Many difficulties are also observable in cases relating to the administration of natural resources. In a case involving an agreement between Bangladesh and an American company to give the latter a ten year licence to capture and export monkeys from Bangladesh, the court ruled that termination of the agreement by Bangladesh was a sovereign act and accordingly held that state immune from US courts jurisdiction.⁹⁷ The case was regarded as "very troublesome" since "what is good for monkeys is good for sugar or petroleum or any commodity".⁹⁸ The decision was clearly based on the nature of activity test and avoided looking at the purpose of the agreement.

These difficulties continue to appear in other cases involving natural resources. Thus, in International Association of Machinists and Aerospace Workers v. OPEC (1981),⁹⁹ a suit was brought against member countries of OPEC for allegedly conspiring to

manipulate oil prices in violation of the US antitrust laws. The action was dismissed by the District Court on the ground that the activity was of a sovereign nature. The decision was reaffirmed by the Court of Appeal, but on act of state grounds. In reaching its decision, the District Court relied on a number of considerations based on international law. The court observed that the: "United Nations, with the concurrence of the United States, has repeatedly recognized the principle that a sovereign state has the sole power to control its natural resources".¹⁰⁰ The decision was closely followed in Rios v. Marshall (1981)¹⁰¹ when it was held that the "removal of natural resources" from the territory of the state was a sovereign act.

The issue was raised again in the matter of SEDCO,¹⁰² when an action was brought in a Federal District Court against PEMEX, Mexico's state-owned oil company. Following the 1970 oil-well disaster, significant quantities of oil reached the Texas shore and claims for damages were asserted against PEMEX. The latter moved to dismiss the action on the ground that it was a governmental agency entrusted with the exploration and exploitation of natural resources and that, as such, it was entitled to immunity. The motion succeeded. The court observed:

Short of actually selling these resources in the world market, decisions and conduct concerning them are uniquely governmental in nature To deny immunity to a foreign state for the implementation of its domestic policies would be to completely abrogate the doctrine of foreign sovereign immunity by allowing an exception to swallow the grant of immunity preserved by Section 1604. 103

These and other cases¹⁰⁴ demonstrate the difficulties of attempting to fit complex issues into phrases such as "nature" and "purpose" of the transaction and it remains to be seen whether that formula will provide uniformity and consistency in this particular regard.

The third main question is whether the relevant commercial activity has a relationship to the cause of the action and to the United States, as described by one or more of the three clauses of S.1605(a)(2). Unlike the UK State Immunity Act 1978, which is silent on the question of jurisdictional principles, the American

legislation provides for jurisdiction where a claim is based on "an act outside the territory of the US in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States".

Again enormous difficulties have surrounded the precise meaning and scope of this complex provision. However, each of the three clauses of this provision provides for a separate jurisdictional principle that must be satisfied in order to obtain jurisdiction over a foreign state. The drafters expected most cases to fall under the first part of the section commercial activities "having substantial contact with the United States".¹⁰⁵ One of these drafters has noted that complex commercial transactions can take an infinite variety of shapes in today's world, and they (the drafters) were reluctant to codify these diverse transactions in the rigid form of a statute. A deliberate decision was taken to allow the law to develop on a case-by-case basis within a framework of general principles laid down by statute. "Thus the Act is more like a constitution than a tax code. The basic rules are there, but the application is left to the development of a federal common law of sovereign immunity".¹⁰⁶

The first case decided under this section was that of Carey v. National Oil Corporation (1977).¹⁰⁷ The claim was based on an alleged breach by the Libyan Government Corporation of a contract to supply crude oil to a Bahamian subsidiary of the plaintiff, a New York corporation. The court declined to assume jurisdiction over the dispute, although the oil refined in the Bahamas by the subsidiary was sold in the US. The court declared itself incompetent because the dispute did not fulfil the "minimum contacts" requirement or produce a "direct effect" within the US. The courts continue to interpret the first phrase of S.1605(a)(2) as not imposing any requirement that the act giving rise to the claim should take place in the United States. If the act that has been performed elsewhere has had substantial contact with the US, non-immunity would be applied. Such an act may be carried on in several jurisdictions at the same time, provided that the act has a

substantial contact with each. Thus, in Gibbons v. Udaras ha Gaeltachta (1982),¹⁰⁸ the plaintiffs were to form an Irish company to manufacture and export plastic cosmetics containers. It was agreed to purchase the necessary machinery in the US and to arrange for its delivery to Ireland; to hold at least 74 per cent of the company's outstanding stock; and to move to Ireland to manage the company. The agency of the Irish company agreed to provide a factory and capital for the venture. Negotiations took place in New York, in Ireland and by telex. When the project failed, the plaintiffs brought an action against the agency, alleging breach of contract and fraudulent misrepresentation. The court held that the agency's conduct in participating in the venture clearly constituted "commercial activity" and that this activity had sufficient contact with the US to satisfy the requirement of S.1605(a)(2).

The substantial territorial link with the forum has been identified by the court on two bases. In the first place, the court ruled that, where "the commercial act centers on the formation of a contract", substantial contractual obligations in the United States will satisfy the territorial nexus required by the section. Secondly, the court relied on the assertion that the contract required the plaintiffs to buy very expensive machinery in the US. However, Gibson v. The Republic of Ireland (1984) provides elements of comparison. The Court of Appeals for the District of Columbia stated that the "based upon" requirement is satisfied if:

The plaintiff can show a direct causal connection between [the foreign entity's commercial activity in the United States] and the act giving rise to his claims, or if he can show that [the act] is an element of the cause of action under whatever law governs his claims. 109

The third jurisdictional test under S.1605(a)(2) is the "direct effect" clause. Various cases have been decided under this clause. The leading case is Texas Trading and Hilling Co. v. Federal Republic of Nigeria (1981),¹¹⁰ arising from Nigeria's repudiation in late 1975 of a large number of contracts for the purchase of cement. The Court of Appeals preferred to decide this case under the direct effect clause. It held that financial loss from breach of contract

is a direct effect when the plaintiff is a company, and that the loss took place in the US. Thus the test is "whether the corporation has suffered a 'direct' financial loss". The court answered the question in the affirmative because the suppliers were American companies and they were to present documents and collect money in the US.

Perhaps the most interesting point in the decision is that the court held that a foreign state is a person for the purpose of the due process clause of the Fifth Amendment of the American constitution and that the federal courts cannot exercise personal jurisdiction over a foreign state without the "minimum contact" standard required by "traditional notions of fair play and substantial justice".¹¹¹ The court found that the Nigerian Central Bank had engaged directly and through the New York Morgan Bank in a series of acts in a way that met the constitutional requirement.

The recent case of Callejo v. Bancomer (1985)¹¹² also raises this issue of determination. This was an action by US nationals, who were resident in Texas and who purchased certificates of deposit from the defendant, which was at the time a privately-owned bank. Their purchases were effected through international inter-bank transfers. When the Mexican banks were nationalized, the Mexican Government issued foreign exchange regulations requiring that the certificates owned by the plaintiff be paid in pesos rather than dollars. An action for breach of contract was brought by the plaintiff against Bancomer. The court had no difficulty in finding that the claim arose from a commercial act. As to the issue of determination of the territorial nexus, the court held that there was a direct effect in the US since the plaintiff's cause of action was based upon the defendant's breach of its contractual obligations to repay the deposit in US dollars.

In view of these broad interpretations of the three clauses of S.1605, it has been argued that the courts have gone too far, particularly in relation to the application of the controversial "effects" doctrines on the ground that, contrary to the decisions in

those cases, the "effects" test was not intended by the draftsmen of FSIA to allow jurisdiction solely by virtue of a financial loss to an American party.¹¹³ Others have appraised the Act's jurisdictional approach "by providing a basis to avoid adjudicating those cases against foreign states having an insufficient relationship with the United States".¹¹⁴

The second exception to the general rule of immunity specified in S.1605 is non-commercial torts occurring in the United States.¹¹⁵ The legislative history of the Act clearly shows that the drafters thought that it would be unacceptable for legislation to provide for non-immunity in commercial cases, while permitting immunity to prevail in civil responsibility for physical damage to a person and property occurring in the territory of the US.¹¹⁶ However, the Act clearly requires that the injury must occur in the United States. What the Act does not make clear is whether the tortious act or omission is also required to occur in the United States. In reading the legislative history of the Act, the courts did confirm that the wrongful act must occur within United States jurisdiction.¹¹⁷

A case directly decided under this section which deserves mention is the decision of the US District Court for the District of Columbia in Letelier v. Republic of Chile (1980).¹¹⁸ On 21 September 1976, the former Chilean ambassador to the US and his Secretary were killed in Washington, D.C., when their car exploded by the detonation of a bomb. Nine individuals, one a US citizen employed by the Chilean intelligence agency, were indicted in the US, and pleaded guilty to conspiracy to murder. The others were acquitted. In November 1978, personal representatives of the deceased brought a civil suit against the Republic of Chile and the individual defendants in the criminal action, seeking compensation for tortious injuries connected with the deaths. The court held that the FSIA, which permits a foreign state to claim immunity for certain enumerated commercial torts and on acts based on "discretionary functions", does not provide a defence against liability where a foreign state has ordered its agents to conduct an assassination or other acts of political terrorism. An ex parte

judgement was given in favour of the personal representatives of the victims.

According to this decision, the determination of questions of sovereign immunity seems to be made with reference to the terms of the FSIA, and not on the basis of the more customary notions of jure imperii and jure gestionis. On the other hand, the courts have declined to assume jurisdiction on the ground that exception to immunity was not available because libel actions are specifically excluded from this area of general exception,¹¹⁹ or because the incident occurred outside the US,¹²⁰ or on the ground that the exception to immunity for personal injuries does not apply to claims involving interference with contract rights.¹²¹

The third exception provided for in S.1605 is maritime claims in rem. Subsection (b) provides that:

A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or a cargo of the foreign state in which maritime lien is based upon the commercial activity of the foreign state

Here, once again, the determination of issues of immunity depends on whether the action is jure imperii or jure gestionis.

The fourth exception is real property and estates. A foreign state will not be accorded immunity in any case "in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue".¹²²

The fifth exception concerns cases where immunity is waived, including international arbitration.¹²³ However the FSIA does not contain any provision on arbitration. Legislation to amend the Act has been introduced in the United States Senate to provide expressly for jurisdiction to enforce arbitral agreements and awards.¹²⁴ The Bill was intended to allow intervention by the United States courts (a) if the arbitration takes place in the United States; b) if the agreement or award is governed by a treaty or other international

instrument which is in force in the US and calls for the recognition and enforcement of arbitral awards; c) if the underlying claim against the foreign state could have been brought in a US court under the FSIA.

However, cases involving an agreement to arbitrate have been analyzed by the US courts relying on the notion of waiver. That tendency may be demonstrated by a case involving Libya,¹²⁵ which was decided by the US Court of Appeal. The dispute went to arbitration as a result of Libya's expropriation of a petroleum concession in 1973. The court took the view that, although the United States was not named as a place of arbitration, consent to have a dispute arbitrated where the arbitrators might determine was certainly consent to have it arbitrated in the United States. Though the court found that Libya had waived the defence of sovereign immunity and had implicitly consented to the jurisdiction of the United States courts for the purpose of the enforcement of the agreement to arbitrate, yet the court declined jurisdiction on the ground that the matter involved an act of a sovereign state.

A more liberal interpretation was adopted in another case concerning arbitration. In the MINE case,¹²⁶ the court held that, as the parties had not contemplated judicial enforcement of their agreement to arbitrate, the defendant state had not waived its immunity in an action to enforce a non-ICSID award.

As far as execution is concerned, the position under the FSIA is not altogether simple. The Act draws a distinction between the position of a foreign state and that of a foreign state agency or instrumentality.¹²⁷ With regard to the former, it allowed execution against property used for commercial activities, with the important proviso that there is a connection between the property and the commercial act which has given rise to the claim on which the judgement is based with regard to state agencies. On the other hand, execution is possible against any property of the agency provided that it had engaged in commercial activities in the United States. In this distinction there is a clear attempt to strike a

balance between the various interests involved, particularly the interests of the foreign states and those of private individuals pursuing their claims against foreign governments.

Following the adoption of the Act, there has been a sharp increase in restrictive practices and there is clear evidence of a strong tendency in favour of further restrictions of state immunity from execution. The most alarming feature is the allowance of attachment of state property and execution in cases that affect the means by which diplomatic relations are conducted. In a case decided in 1980 concerning the Government of the Republic of Tanzania,¹²⁸ a United States District Court upheld the attachment of the bank account of the Embassy of the United Republic of Tanzania on the ground of waiver of immunity. Attachment of the mixed bank account was allowed, for an embassy can easily protect its government's funds by segregating its "public purpose funds from commercial activity funds".¹²⁹ At the same time there has been a reaction by the courts themselves against the sharp increase in these restrictive practices. In *Letelier's case*,¹³⁰ a judgement awarding damages on the tort suit was rendered in favour of the plaintiffs against the Chilean Republic. Following the judgement, an attempt was made to execute the judgement against that state's national airline. The latter argued against the motion on the ground that it is a separate judicial entity from the Chilean state. It also argued that, even if it could be deemed liable for Chile's debt, the FSIA had barred execution of the airline's assets. The Federal Court of Appeal decided in November 1984 that the Act contains no provision for the enforcement of judgement in tort cases, except where the judgement arises out of the commercial activities of the foreign state concerned. It would of course be very rare for a tort action to arise out of commercial activities. The court arrived at a remarkable conclusion that congress had in that instance created "a right without a remedy".

Due to these contradictory decisions, the proposal to amend the FSIA includes a provision to remove these ambiguities. S.1071 would amend the FSIA, a) to permit execution of provisions of the

Act to be applied generally to enforcement of arbitral awards as well as judgements; b) to remove the limitations on execution against property of foreign states whether or not there is a relationship of that property to the cause of action; c) to permit execution against property of foreign states to satisfy a tort judgement; d) to exclude execution against property of a foreign state (including bank funds) used for diplomatic or consular purposes; e) to allow arrests, execution against foreign state ships in foreclosure proceedings; g) to allow provisional remedies in an action against an agency of a foreign state, but not the property of the foreign state itself, in certain cases; and h) to remove the act of state doctrine as a defence in cases of illegal expropriation, a breach of contract or enforcement of an agreement to arbitrate an arbitral award against a foreign state.¹³¹

Now the FSIA has been in operation for 11 years. Various arguments, interpretations and judicial attitudes have been expressed as to the meaning of the relevant provisions. Some of these interpretations go to the extreme of restricted immunity and show a sharp increase in the extent of restrictive practice. In some cases the US courts appear to have imposed self-restraint by holding that they have no jurisdiction on the ground, for example, that the injury in question had occurred outside the US, or that the commercial transaction in question had no adverse effect on the US, thus adopting a more relaxed attitude to liberalizing the provisions of the Act.

Many critical comments have been made against the Act, not only from outside the US, but also by American scholars and courts. For example, an American judge was recorded as saying that the Act is a: six-years old statutory labyrinth that, owing to the numerous interpretative questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boom for the private bar but a constant bane of the federal judiciary. 132

Other judges noted that the Act "fails to give concrete guidance to courts",¹³³ and that it "has produced a body of case law somewhat obscure and confusing and at times seemingly inconsistent".¹³⁴

The far reaching implications of some of these decisions have yet to be seen in the future practice of the United States courts, in which slow progress in improving the Act seems likely.¹³⁵ At any rate the Act appears to have achieved what was intended to be done after a lot of diplomatic tension and pressure on both the United States Department and judiciary, namely the avoidance of diplomatic repercussions in cases involving foreign states. The point was summarized in the following words by a scholar who wrote in 1983 that:

In the six years since the enactment of the FSIA, the statute has been largely successful in affording private parties the opportunities to have claims arising out of commercial activities adjudicated in federal courts, without engendering diplomatic repercussions. 136

(b) UK State Immunity Act 1978

The survey of English case-law prior to the enactment of the State Immunity Act, 1978, tends to indicate that there has been steady, if occasionally uncertain, movement away from the doctrine of absolute immunity. That the movement has been uncertain is partly due to the role which the doctrine of precedent plays in the development of case-law in England;¹³⁷ that the courts felt compelled to apply earlier decisions incorporating the rule of general international law as they were thought to exist at the time.

The records show that the British Government was very reluctant to legislate on this subject.¹³⁸ However, the UK became a signatory to the 1972 European Convention on State Immunity in the belief that its provisions reflected with sufficient accuracy general state practice in the field of sovereign immunity. By acting as a signatory to the Convention, the UK decided to

legislate, and thus enacted The State Immunity Act 1978 which came into force on 22 November 1978.¹³⁹

The Act put an end to the long doubt and ambiguity and cleared up much of the uncertainty observable in English courts prior to its enactment, by adopting the relative theory of state immunity. Although closely modelled on the European Convention, the Act goes beyond the scheme of the European Convention in several respects,¹⁴⁰ while simultaneously improving certain provisions of the Convention.¹⁴¹

Section 1 reaffirms the principle of state immunity or immunity of foreign states from jurisdiction and goes on to enumerate the possible exceptions to the general rule as follows:

- 1) Submission to jurisdiction.¹⁴² (S.2(2)).
- 2) Commercial transactions and contracts to be performed in the UK. These exceptions were primarily based on the nature of state activities. Commercial transactions were defined in broad terms by "reference to the nature of the course of the conduct or particular transaction rather than by reference to its purpose".¹⁴³ S.3(3) defines commercial transaction to mean contracts for the supply of goods or services, loans or financial transactions and "any other transactions or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority".
- 3) Contracts of employment to be performed in the UK either wholly or partly. (S.4).
- 4) Proceedings in respect of death, personal injuries, or damage or loss to tangible property. (S.5).
- 5) Proceedings relating to a state's ownership, possession or use of immovable property. (S.6).
- 6) Proceedings relating to patent, trade mark and other intellectual property rights. (S.7).
- 7) Proceedings concerning state membership of bodies corporate which have members other than states. (S.8).

- 8) Proceedings in English courts relating to disputes which the state has agreed in writing to submit to arbitration. (S.9).

The third significant group of cases for which there is no immunity concerns admiralty proceedings relating to ships used for commercial purposes. This statutory provision endorsed the restrictive view adopted by the Privy Council in the Philippine Admiral case (1975).¹⁴⁴ Under this provision, proceedings are applicable to both actions in rem and in personam.

However, it should be mentioned that the Act does not limit the scope of commercial transactions to these examples, but includes a broader definition of "commercial transactions" in order to also embrace activities of a private nature that do not fall within the specified cases. Thus, Section 3(3)(c) states the term includes:

any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character), into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

To the question as to who is entitled to immunity, the Act gives an answer by distinguishing between a 'state' and a 'separate entity'. The term state may include the following categories: The sovereign or head of state, the central government and its various organs or departments. In order to determine when an entity constitutes a part of the state, the Act provides two criteria for such determination: their distinctness from the executive branch of the government and their capabilities of suing and being sued. It was thought that the Act had attempted to help the courts by providing statutory guidance to enable the court to dispose of the issue more easily and effectively.¹⁴⁵ However, it may be recalled that, while the United States Act provides that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction, rather than by reference to its purpose",¹⁴⁶ the United Kingdom Act contains no provision that expressly excludes the purpose test, an approach which is endorsed by Professor Crawford. He expresses the view that it is advisable that a statute enumerates certain

transactions as commercial, irrespective of any argument that can be raised about the 'capacity' in which the foreign government performed those transactions.¹⁴⁷

Immunity from execution is recognized in S.13 of the Act, whether by way of injunction or order of specific performance or for recovery of property. The Act also provides for immunity of state property from arrest and detention. The Act seems to eliminate the practice under which the Mareva injunction had been issued to prevent the Central Bank of Nigeria from drawing on its funds pending the disposal of the Trendtex case. It is possible that, on a proper construction of S.13 of the Act, such funds would now be entirely immune from attachment, unless of course the bank set aside a separate portion of the funds for the specific purpose of satisfying the judgement or a creditor's interest.¹⁴⁸ However, it should be noted that the Act contains no specific rule providing for immunity of a state from execution as it does in Section 1 for immunity from suit, although it might be argued that the general prohibition of Section 1 is wide enough to include measures of execution, as well as jurisdiction.

Very few cases have been decided by the English courts following the introduction of the State Immunity Act. One notable case is the decision of the House of Lords in Alcom Ltd. v. Republic of Colombia (1984)¹⁴⁹ which involved a sensitive matter concerning the attachment of the funds of a diplomatic mission. In this case the appellant was seeking the execution of a default judgement rendered for some #41,000 in respect of security equipment allegedly purchased by the Colombian Mission in London. The garnishee orders granted in Alcom's favour were set aside by Hobhouse J. on the ground that the primary purpose of the account was for non-commercial purposes, namely running the embassy, and was therefore not subject to measures of execution.¹⁵⁰ The Court of Appeal, in a judgement delivered by Donaldson, M.R., and concurred in by May and Dillon, L.J.J., restored the garnishee orders. In his certificate before the Court of Appeal, the ambassador of Colombia stated that the bank accounts in question were not in use

or intended for use for commercial purposes, but only to meet the expenditure necessarily incurred in the day-to-day running of the diplomatic mission. It was held by the Court of Appeal that the purpose of the account could never be to "run an embassy"; the purpose was to pay for goods and services to enable the embassy to be run. In the opinion of the court that purpose fell within the very wide definition of "use for commercial purpose" as defined by Section 17 of the State Immunity Act 1978. According to the Master of the Rolls that definition is consistent with the principles of international law which lay emphasis on the nature of the transaction rather than the reason why the transaction was undertaken.

As pointed out in a commentary¹⁵¹ on the Court of Appeal decision in the *Alcom* case, certain diplomatic missions had had their embassy accounts attached as a consequence of that decision; others had moved or had threatened to move their accounts to the Channel Islands; and yet others had informed the Foreign Office that, on the basis of reciprocity, the property of United Kingdom missions abroad was liable to attachment. The Court of Appeal decision was reversed by the House of Lords in a single judgement delivered by Lord Diplock. Counsel for the Attorney-General, who had appeared as amicus curiae in the proceedings before the House of Lords, and Counsel for the appellant had submitted that neither international law nor the terms of the State Immunity Act 1978 permitted the making of a garnishee order against a current account of a diplomatic mission in London that was used to meet the day-to-day running costs of that mission, and this line of argument prevailed.

In making his order, Lord Diplock pointed out that the question of law that was involved was of outstanding international importance. He gave authoritative confirmation that, before the promulgation of the Act, English common law had adopted a restrictive theory of immunity based on the distinction between sovereign and commercial acts. He unequivocally accepted the wholly convincing reasoning of the German Constitutional Court in the

Philippine Embassy case in which the court decided that the assets of the embassy, including bank accounts, were exempt from attachment. He also recognized the existence of a rule in public international law requiring immunity from execution for the current bank account of a diplomatic mission used for defraying the expenses of running the mission. After a thorough review of other provisions of the Act, and in the light of the background of its subject matter and principles of public international law, he concluded that the inclusion in the general account held for the diplomatic mission of some monies due under contract for the supply of goods to the mission was insufficient to bring it within the exception to the foreign states general immunity from execution.

The decision in the *Alcom's* case raises interesting questions of interplay between various aspects of state immunity as far as immunity from execution is concerned. In the first place the case involved immunity from execution after a final judgement; rather than immunity from attachment and jurisdiction. Immunity from execution belongs to the post-judgement phase of the proceedings. If there are difficulties in the selection of competing criteria for determining state activities to be accorded immunity and those which are not entitled to immunity, there are indeed even more difficulties in regard to the corresponding question of immunity from attachment and execution.¹⁵² It has been generally accepted that immunity from attachment and execution is far more absolute than immunity from jurisdiction.¹⁵³ However, the question continues to be validly asked whether distinctions such as acta jure imperii and acta jure gestionis could be used to determine the question of immunity from execution. This debate raises substantial problems which are still to be resolved.

In the second place the *Alcom* case raises the question of the link between immunity from execution and diplomatic immunity within the context of the State Immunity Act on the one hand and diplomatic immunities under international law on the other. As to the former, the Court of Appeal did not consider the peculiar position of diplomatic missions and the execution of their

privileges from the scope of the State Immunity Act.¹⁵⁴ It was thought that it was due to this failure on the part of the Court of Appeal that the appeal to the House of Lords succeeded.

As to the second point, namely the relation of state immunity to diplomatic immunity in public international law, it should be borne in mind that the Vienna Convention of 1961 had not dealt with immunities of diplomatic missions as organs of states, but had merely regulated the question of inviolability of the mission's premises and personal immunities of diplomats. It must be emphasized that diplomatic immunity is only a passive aspect of state immunity, whereas immunity from suit or execution is a positive aspect requiring the host state to refrain from exercising jurisdiction in respect of the missions, premises, staff and property. Apart from the private bank account of a diplomat, which enjoys immunity, the convention is silent on immunity for the funds of the diplomatic mission. The travaux preparatoires of the international law commission's work on the subject and the plenipotentiary conference throw little light on the point. The reason for the omission probably derives from the lack of separate personality enjoyed by the diplomatic mission apart from the state which it represents. It is incorrect to speak in terms of "property immunity" since, ultimately, it is always a state and not property that enjoys immunity.¹⁵⁵ However, it has been argued that the problem can easily be solved by affording immunity to the bank account of the mission, if it was held in the name of the ambassador as head of the mission, but not allowing the process of execution against the bank account of the sending state, and if the mission cannot segregate, for whatever reason, its public purpose funds from funds for other activities, the immunity of its funds as part of the general state funds must be based on the public purpose functions which they serve.¹⁵⁶ Yet it should be recalled that the International Law Commission, in dealing with the subject, was prepared to include property used or intended to be used for diplomatic or consular purposes, among the types of property permanently immune from attachment and execution.¹⁵⁷ If the word

'property' is taken in its literal sense, it obviously would include funds of an embassy or diplomatic mission of the foreign state.

At any rate, the ruling given by the House of Lords in the *Alcom* case is of interest in that it places a strict limitation on the interpretation by the courts of what constitutes property used for commercial purposes; recognizes the distinction between immunity from suit and immunity from execution and, most significantly, confirms authoritatively the restricted doctrine of immunity.

(c) National legislation of other countries

Canada adopted its own State Immunity Act 1982.¹⁵⁸ The Act expressly recognizes the rule of state immunity and enumerates a number of exceptions thereto. These exceptions are strikingly similar to those provided in US and UK legislation.

**(d) National legislation of countries outside
America and Europe**

The extensive reflection of the United Kingdom's change of attitude towards state immunity has been clearly felt in South Africa, which has recently adopted its own Act.¹⁵⁹ This Act essentially reproduces the provisions of the United Kingdom Act 1978 both in substance and form with minor alterations and modifications.

Australia was the last to undertake the codification of the rule of foreign sovereign immunity.¹⁶⁰ The legislation, which entered into force in 1986, clearly established that immunity from jurisdiction accorded to foreign states does not extend to commercial or non-governmental acts of states.

In Asia, two countries, Singapore and Pakistan, have adopted a similar comprehensive piece of legislation, wholly covering the question of foreign state immunity. In Singapore, an Act was passed on 26 October 1979, entitled the State Immunity Act 1979.¹⁶¹

This is closely modelled on the United Kingdom Act and contains substantially the same provisions in many respects. No single variation from the UK Act could be spotted in Singapore's Act. The other Asian country to enact legislation on the subject is Pakistan which issued The State Immunity Ordinance 1980,¹⁶² an ordinance substantially patterned on the United Kingdom enactment.

Although these legislations differ in methods of drafting and formalities, all of them share an underlying common factor, namely, the restricted theory of immunity.

II. INTERNATIONAL EFFORTS TOWARDS CODIFICATION OF THE LAW OF STATE IMMUNITY

1. Prior to and During the League Era

(a) Institut de Droit International (1889)

The efforts to achieve greater certainty on the subject by means of codification began in the 19th century and continue to this day. At Hamburg, on 11 September 1891, the Institute of International Law adopted a resolution embodying rules proposed by L. Von-Bar. These would exempt from seizure the movables belonging to a foreign head of state and intended for his use or for the use of his suite. They would permit real actions asserting ownership or possession of immovables or movables claimed by a foreign head of state in his character as heir or devisee of an estate or as participant in commerce or industry.¹⁶³ The rules proposed can be seen to be in harmony with continental practice and jurisprudence, but in his next two rules, L. Von-Bar was consciously proposing an extension of the jurisdiction of the local courts into an area where opinion was much less settled. This was where he allowed action on contracts concluded and torts committed in the territory. Some of the participants protested against this extension, but the majority

of the Institute members supported Von-Bar and the resolution was adopted.¹⁶⁴

(b) The League of Nations' Committee of Experts (1924-30)

The codification effort of the League of Nations was the first of its kind to be undertaken by an international organization. The committee had decided to include in its list the question of the competence of the courts in regard to foreign states on the basis of a report submitted to it by a sub-committee on the topic.¹⁶⁵ Mustada, the Special Rapporteur, had submitted a detailed survey of the law on the subject and concluded that, in view of the extension of state activities in commercial fields, it could be considered just and reasonable to treat certain acts of states as acts of private parties. Yet he observed that it was difficult to delimit these acts in a way that could serve as a basis for treaty provisions. In his observation to the Rapporteur's report, Professor Diena¹⁶⁶ took the view that difficulties of that kind were frequently encountered in international law; but they could not be allowed to stand in the way of drawing the distinction.

A questionnaire was addressed to various governments to ascertain the position of states engaged in industry and commerce before the court of another state. Replies were received from 30 governments,¹⁶⁷ and the committee accordingly recommended in its Fourth Report that the subject appeared ripe for codification because the state so frequently appeared at that time as litigant in the courts of other states. However, the Conference of Codification of International Law held at The Hague in March 1930, did not deal with the topic of state immunity. It seems that the Council of the League had rejected that subject among other topics mainly because it considered it would be difficult to secure a general agreement and the matter did not appear to be urgent.

(c) Harvard Law School (1932)

Another attempt to codify the rules of state immunity during the League era was made by the Harvard Law School. "Research in International Law", a draft on jurisdictional competence over foreign states was formulated in 1932.¹⁶⁸ The draft emphatically supported the doctrine of limited state immunity stating that, despite certain difficulties, it was time to establish the distinction between acts jure imperii and acts jure gestionis. The object of the provisions adopted by the group was to supply a criterion for the solution of the problem of state immunity. Art. 11 of the draft requires a territorial link between the activity undertaken and the forum state in order for non-immunity to be applied. The provision also introduces the test of whether states are engaging in those activities which private individuals may perform.¹⁶⁹

2. The United Nations Era

(a) Efforts of regional governmental committees

i. The Asian-African Legal Consultative Committee

The Asian-African Legal Consultative Committee discussed the immunity of states at its first session in New Delhi. The subject was referred for the opinion of the Committee by the Government of India.¹⁷⁰ The Committee continued its discussion on the subject at its second session held in Cairo on 1 October 1958.¹⁷¹ The question before the committee was whether, under the modern trend of restricting state immunity, it is desirable for Asian-African nations to consider if they also should place restrictions on the immunity granted to foreign states in respect of their industrial and commercial activities. All the delegations at the Cairo session, except that of Indonesia, espoused the view that foreign states should be made answerable in the local courts when they engage in business of a private nature.¹⁷²

The Committee concluded its work on the subject at its third session in Colombo in 1960, which was attended by delegations of the governments of Burma, Ceylon, India, Indonesia, Iraq, Japan, Pakistan and the United Arab Republic. The final report of the Committee on the question of state immunity recommended that immunity should be denied in respect of commercial activities of states. The basic consideration is that a state may be sued if it engages in a commercial enterprise in which private persons may there engage. The recommendation was agreed to by all the delegations except that of Indonesia.¹⁷³

ii. European Committee on Legal Co-operation

The topic of state immunity was also considered within the framework of the legal programme of the Council of Europe. The council set up a Committee of Experts to examine the problems relating to state immunity with a view to choosing the best method of resolving these problems. The Committee's efforts culminated in the adoption of the European Convention on State Immunity and Additional Protocol, which was opened for signature at Basle on 16th May, 1972.¹⁷⁴

The Convention mentioned in its preamble, "a tendency to restrict the cases in which a state may claim immunity before foreign courts", thus recognizing implicitly the general principle of immunity as the basis of its provisions.

Articles 1 to 14 of the Convention set out a number of circumstances in which immunity could not be recognized:

(1) Cases in which a contracting state institutes or intervenes in proceedings before a court of another contracting state and cases in which such a state makes a counterclaim in proceedings before the court of another contracting state (Art. 1); cases in which a contracting state expressly consents to exercise of jurisdiction whether by written agreement, international or intergovernmental

treaty (Art. 2); and cases of implied waiver of immunity (Art. 3); other than cases of appearance to claim immunity.

(2) Articles 4 to 12 enumerate cases as not entitled to immunity on the basis that they are jure gestionis activities, including commercial contracts (Art. 4); contract of employment (Art. 5); participation in a company or other bodies corporate (Art. 6); industrial or financial activity of an agency situated in the forum state (Art. 7); proceedings relating to patent, trade mark and other industrial property (Art. 8); proceedings concerning the right or interests of a state in, or its use or possession of, immovable property (Art. 9); proceedings relating to right in immovable property arising by way of succession, gift or bona vacantia (Art. 10); proceedings concerning personal injuries and damage to property (Art. 11); proceedings relating to the validity or interpretation of an arbitration agreement or proceedings to set aside an arbitral award (Art. 12).

However, Art. 23 of the Convention prohibits measures of execution against the property of a contracting state unless that state expressly consents thereto in writing. This Article in effect affirms the classic position in favour of immunity from attachment and execution of property of a state in the absence of its consent.¹⁷⁵

The inherent difficulties of drawing the borderline between cases of immunity and non-immunity were overcome by the Convention in the sensible solution of establishing the general rule of state immunity and then providing for specific cases in relation to which immunity would not apply, thus avoiding the insurmountable problems of defining sufficiently the contents of acts jure imperii and acts jure gestionis.¹⁷⁶

Again the reaffirmation of the rule of absolute immunity in cases of execution is clearly based on mutual confidence within a closer community. This underlying consideration is further corroborated by an undertaking on the part of each contracting state

to honour a judgement given against it (Art. 20(1)). Even this undertaking is further limited by absolving a contracting party from giving effect to a judgement rendered against it, if it is manifestly contrary to the public policy of that state (Art. 20(2)), or if the judgement is in regard to a right of movable or immovable property arising by way of succession, gift or bona vacantia, or if the court would not have been entitled to assume jurisdiction, or its rules on the subject are different from the rules of private international law of the forum state (Art. 20(3)). Thus many safeguards have been provided for, which are in effect sufficient excuse for a contracting state not to comply with a judgement rendered against it.¹⁷⁷

Finally, since it had not been possible in the Convention to cover all situations in which a state may act in a private character, a clause has been included (Art. 24) whereby a state party may declare that it can go further in restricting foreign state immunity than that stipulated in the Convention. That clause has in fact been invoked by most of the countries that have ratified the Convention. The clause was primarily included in the Convention to meet the concern expressed by various countries applying restrictive immunity who feared that some commercial activities of foreign states might not come within the exceptions enumerated, and therefore limited the competence of their courts on these activities.

Under the influence of the Convention, various countries party to the instrument have adopted certain legislative measures to give effect to the provisions of the Convention by designating the competent courts to determine whether foreign states should be accorded sovereign immunity.¹⁷⁸ Surprisingly, the number of ratifications to the Convention since it came into force on 11 June 1976 is still very limited, and it is at present only six states: Austria, Belgium, Cyprus, Netherlands, Switzerland and the UK. Nevertheless, overall the Convention stands as an outstanding effort, at governmental level, to deal with a highly complex subject

in international law surrounded by a divergence of opinions and the differing jurisprudence of the various legal systems.

iii. The Inter-American Judicial Committee

Recently the Inter-American Judicial Committee adopted the Inter-American Draft Convention on Jurisdictional Immunities of States (1983).¹⁷⁹ But this draft is not really an international instrument. It is a draft prepared by the Inter-American Judicial committee - a technical body - and has not yet been examined by the political organs of the Organization of American States. If the Council of OAS approved the draft, it would come before the General Assembly, which would then convene a conference in order to convert the draft into a convention. At the present time, therefore, the draft is not on the same footing as the 1972 European Convention on State Immunity which is a binding international convention.

However, the draft clearly endorses the restrictive theory of immunity. In Part II of the draft, entitled "Exceptions to Jurisdictional Immunity", Art. 5 expressly excludes commercial activities of foreign states from the benefit of immunity. Arts. 6 and 7 further list a number of cases in which immunity may also not be claimed: 1- labour affairs or contract of employment; 2- proceedings concerning distribution of assets; 3- actions involving real property situated in the forum state; 4- tax matters related to real property under 3- above; 5- proceedings related to tortious liability arising out of commercial activities; 6- judgement regarding litigation fees; and 7- cases of waiver of immunity and counterclaims.

The draft, the latest of its kind, is clearly influenced by the European Convention on State Immunity and The International Law Association 'Montreal Draft' on the subject. However, a new area appears to have been added to the exceptions to immunity, namely, when the judgement includes the court fees.

(b) Efforts of non-governmental, professional
and academic bodies:

i. The International Law Association

At its 45th session in Lucerne in 1952, The International Law Association began to study and discuss state immunity. On conclusion of its work in that session, the Association adopted a resolution stating that a foreign state should not be protected by immunity from jurisdiction in respect of acts of a private nature undertaken by that state. The preamble stated the conviction that, in view of the encroachment of the state into the commercial field, the national courts of various jurisdictions have broken away from the traditional conception of state sovereignty. The traditional doctrine was said to be getting out of date as regards where a state engages in commercial transactions or other private activities.¹⁸⁰ The Association resumed its work on the subject at its Belgrade meeting in 1980, where the preliminary report of a working group was discussed.¹⁸¹ This report observed that, in view of the prevailing state practice and recent codification of state immunity in some countries, it appeared that the rule of absolute immunity can no longer be regarded as the dominant rule of international law, and that the restrictive theory had achieved sufficient adherents. The restrictive theory is clearly reflected in the draft convention. Art. III of the draft convention enumerates the circumstances in which foreign states cannot claim immunity before the tribunal in the forum state and these include: 1- waiver of immunity, counter-claims and set off; 2- an implied waiver in the event of an agreement to arbitrate; 3- cause of action arising out of commercial activity or out of contract; 4- proceedings concerning contracts of employment and their enforcement; 5- causes of action relating to a foreign state's interest in, or use of, immovable property in a forum state as well as with its rights in both movable and immovable property arising by way of succession, gift or bona vacantia; 6- disputes relating to intellectual or industrial property; 7- causes of action concerning death, personal injury or

loss to property; and 8- proceedings concerning rights in property taken in violation of international law.

As far as immunity from attachment and execution is concerned, Art. VII of the draft convention lays down a general rule of immunity with respect to attachment and execution against a foreign state's property in the state of the forum. Nevertheless, Art. VIII of the draft convention contains the following three exceptions to immunity from attachment: 1- if there has been a waiver of immunity, e.g. in the case of commercial activity; 2- if the property in question is in use for a commercial purpose; 3- if the property in question has been taken in violation of international law or has been exchanged for such property. Section B of the article deals with mixed bank accounts and limits immunity to that proportion of an account duly identified for use for governmental activities. Section C gives a list of the type of property in respect of which execution shall not be permitted. Indeed, the content of this draft convention appears to reflect the contemporary thinking of writers or opinioes doctorum. The draft was prepared by a highly representative group of experts from countries such as Egypt, France, Federal Republic of Germany, Greece, Japan, the Netherlands, Norway, Pakistan, the Philippines, Poland, the Soviet Union, Sweden, Switzerland, the United Kingdom, the United States of America, Yugoslavia and Zambia. The draft strongly supports the conclusion that there is an emerging trend, if not an 'emerged' trend, in favour of asserting jurisdiction over foreign states in cases involving commercial activities, despite the fact that the drafters have been primarily inspired by the rules embodied in the 1972 European Convention and the United Kingdom and United States legislation on the subject. Generally speaking, what the International Law Association has done is a splendid effort and a valuable attempt to channel that trend in a constructive direction.

ii. Institut de Droit International

The efforts of the Institute towards codification of the law of state immunity started, as has been mentioned, in 1891. The

Institute resumed its work on the subject and adopted a resolution at its session in Copenhagen in 1950¹⁸² similar to its 1891 resolution, and a new article was added by which public debts of a foreign government were exempt from the jurisdiction of local courts (Art. IV).

The subject was also included in the Institute's programme for 1954. On 30 April 1954, the Institute approved new resolutions concerning the immunity of foreign states from suit and measures of execution, the new resolutions once again reflecting the restrictive view of immunity, confirming immunity in regard to acts done in pursuance of sovereign power but denying immunity relating to an act which was non-sovereign. It was left for the courts to determine whether or not an act is one of sovereign authority.¹⁸³

iii. International Bar Association

The subject of state immunity was included in the Association's agenda in 1958 at its meeting in Cologne. The draft resolution proposed at that meeting favoured the application of the doctrine of restrictive immunity in line with the discussion which took place.¹⁸⁴ The Association continued its deliberations on the subject at its meeting at Salzburg in 1960. A resolution was voted, clearly endorsing the restrictive view of immunity and containing detailed circumstances in which a claim of state immunity before local courts might not be accorded.

A brief historical sketch of international efforts has been given above. The survey affirms the increasing tendency to restrict the immunities of foreign states when they engage in commercial activities with private individuals. The work done in that regard made a large contribution towards the development of the law of state immunity. As these bodies included a highly qualified group of experts and international lawyers, their work reflects to a very large extent the already existing international law and the trend in its development which is obvious from the early judicial decisions

of continental countries and recent state practice for at least the last twenty years or so.

(c) The United Nations International Law Commission

The topic of jurisdictional immunities of states and their property has been part of the Commission's work since its first session in 1949 and has been included in the current programme of the Commission since its thirtieth session in 1978. By 1986, Mr Sompong Sucharitkul had submitted eight reports¹⁸⁵ covering various aspects of the topic. These reports dealt with both immunity from jurisdiction and execution, and were clearly based on the restrictive theory of immunity, covering in great detail rules of competence and jurisdictional immunities, the concept of consent, voluntary submission, counterclaims and their consequences. The reports have identified certain cases of state activities which are not subject to immunities, namely, commercial contracts, contracts of employment, personal injuries and damage to property, ownership and possession or use of property, cases relating to patents and intellectual property, cases relating to fiscal obligations such as taxes, customs and excise, cases in which states participate in a company or other body corporate, ships employed for commercial service and conclusion of an agreement to arbitrate.

The topic of state immunity is of great practical importance, particularly in view of developments in international relations and the interdependent nature of the activities of states. Although there are existing practices on the subject, they are not uniform, ranging from simple courtesy to the application of treaty regimes of varying complexity. There is a pressing need to regulate the subject by an international instrument which would take these considerations into account.

Again, the topic lies at the point of intersection of two equally exclusive sovereignties: the sovereignty of the foreign state claiming immunity and the sovereignty of the territorial state seeking to exercise jurisdiction over the first. For the purpose

of fostering peaceful international relations, an area had to be created, with the consent of all states, where the two sovereignties could interrelate and peacefully co-exist with one another. The problem becomes more acute if we realize that each of the conflicting sovereignties has its own defenders and its own legal propositions and doctrines. Thus, the subject is particularly important in the development of cooperation among states with different social and political systems.

Another important aspect of the Commission's work on the subject lies in the fact that a number of states are contemplating national legislation on the point. Thus, the work of the Commission will provide very useful guidance for such countries, particularly with regard to the difficulties of distinguishing between the various activities of states. Again, the development of activities of states in the field outside the usual framework of the traditional concept of the maintenance of law and order within the state borders and defence of its people and territory, and the intervention of states in numerous human activities, suggests that some adjustment in the application of the traditional concept of state immunity would be appropriate. On the other hand, some legislation and court decisions have gone too far to the other extreme. In the unsatisfactory situation being created, the international community needs an international instrument capable of re-establishing some order in this domain of utmost importance.

In short, the existing situation concerning the position of foreign states before local courts is highly unsatisfactory in that disputes involving states and their property are regulated by bilateral arrangement and in some cases by the notion of reciprocity, and where such agreement or reciprocal treatment is lacking, states are subject to the jurisdiction of municipal courts, which would have to decide on the basis of their local law on state immunity. Thus the Commission's work on the subject is of great concern to the international community, since its aim is to harmonize various interests, reconcile the differences between legal

systems and resolve practical problems in international relations.¹⁸⁶

It is clear from the eight reports the Special Rapporteur has submitted that the Commission has adopted the inductive approach, that is to say, to rely on state practice rather than to base draft articles on an expression of the concept in general terms.¹⁸⁷ The unhelpfulness of the inductive approach was pointed out by several members, including Sir Francis Vallat, who explicitly stated that:

One fundamental consideration to be borne in mind in drafting treaties is that a better result might be achieved by expressing the concept in general terms than by attempting to reflect individual legal systems. 188

The inductive approach was attacked by another commissioner, who took the view that it seemed pointless to base the draft articles on the practice of states "either it [is] fragmentary - often consisting only of the practice of a few large states - or because it [is] non-existent".¹⁸⁹ Some other members of the Commission, while generally endorsing the Special Rapporteur's approach, sounded a note of caution not to abuse the inductive method. In order to be of real assistance to states, the draft articles must represent a realistic picture of present-day state practice and of the direction in which it is moving.¹⁹⁰

The Special Rapporteur has himself noted in his fourth report that:

.... The method and techniques employed in preparing the reports and draft articles have been inductive in the sense that conclusions and propositions of law are to be drawn from the practice of states and not in isolation from the living realities of customary international law. The task before the Commission includes a process of codification of existing practice and progressive development of rules of international law designed to reconcile, if not resolve, the various conflicts of interest 191

However useful the inductive approach might be,¹⁹² it is not wholly appropriate for the present topic. Given the incoherences in state practice on the subject, as noted by the Special Rapporteur,¹⁹³ there is always the danger that state practice, particularly with

regard to court decisions and internal legislation might be misunderstood or misinterpreted. Since an essential part of the Commission's task is to contribute to the progressive development of international law, taking account of the trend which has occurred over the past decades, the draft articles must be a reflection of the present-day trends and take account of the various legal systems represented in the Commission, and not follow rigidly the inductive method, bearing in mind the fact that many of the newly independent countries have no practice whatsoever on the subject and the materials at the disposal of the Commission are in fact rather limited.

The subject also presents considerable doctrinal and conceptual difficulties. In the first place, a sharp controversy continues to divide those who support 'absolute immunity' and those who support 'restricted immunity', and the Commission's work is still being hampered by the inflexibility with which proponents of both doctrines adhere to their respective positions. According to the first group, the principle of state immunity admits of no exception save those arising from express or implied consent of the state entitled to assert immunity. According to the second group, the essence of the principle of state immunity is that it is neither the object of the transaction nor the person of the actor, but the nature of the transaction that determines whether immunity should be accorded.

Conceptual differences also exist with regard to the personality and function of states. According to proponents of the absolute theory, a state is indivisible and cannot act but in its public capacity, whereas the proponents of the restrictive theory reject this notion and treat the state as a dual person capable of performing both public and private acts. The conceptual difference seems to centre also on the required safeguard which will take more fully into account the concern and the need of the developing countries for the reasonable protection of their sovereign rights to pursue policies in line with the objectives of economic and social development. Thus, the Commission's task is essentially to

conciliate between two extreme, opposed views. To these doctrinal and conceptual differences in outlook, there is no practical solution.¹⁹⁴

It would be prudent to wait until the total picture is complete, and then look carefully at the set of draft articles as a whole with a view to settling the problem in a reasonable and balanced manner.¹⁹⁵ However, it was clearly stated by the Special Rapporteur that these differences of ideologies are inevitable and it was not the Commission's task to resolve them. Therefore the Commission's work is not based on any such differences which could give rise to objections from one side or another.¹⁹⁶ At any rate, to put the rule of state immunity in monolithic terms of 'absolute' and 'restrictive' immunity would not indeed serve the purpose of the Commission or provide a workable solution. On the contrary, they would tend to diversify rather than harmonize the law on the subject and unless something is done to lessen this sharp controversy, those differences of opinion would continue to constitute a source of endless dispute. But the existence of different approaches does not mean that the Commission's work could not have a successful result or that the scope of such a result is bound to be very limited. The comments made by the Italian representative to the Sixth Committee of the General Assembly seem particularly convincing.¹⁹⁷ Mr Treves observed that two general ideas seem to be held by all states. Firstly, there are some situations in which states enjoy immunity and, secondly, that, at least in some cases, such immunity does not apply. According to him, that observation seems to be supported by a tendency to give importance to the notion of reciprocity, on the basis of which states are readily prepared to change their attitude towards immunity. In his view this stands as confirmation of the restrictive view of immunity. He was of the opinion that the draft articles adopted by the Commission in its first reading are a reasonably well-balanced compromise, mainly for three reasons:

- 1) Immunity from jurisdiction has to be treated as a general rule, thus corresponding to the position of the partisans of absolute

immunity.

2) Limitations or exceptions to that general rule have to be reasonably numerous and laid out in some detail, thus satisfying the needs of the proponents of restricted immunity.

3) Immunity from measures of constraint should be spelt out in wider terms with only limited exceptions.

In this way the first compromise would provide some relief to socialist states; the second would afford some guarantees to those countries practising the restricted view, particularly the developed countries; and the third compromise would give an indispensable safeguard, especially to the developing countries involved in litigation in those countries applying restricted immunity. These suggested compromises might lead the Commission to a successful result. Thus, it was not impossible to adopt a neutral position midway between the two approaches.

A third major difficulty confronting the work of the Commission was the complexity of the subject because it involved domestic law on the one hand, and public and private international law on the other. For example, reference must be made to international law for the purpose of determining the extent to which immunities apply. Private international law governs problems on conflict of laws, whether on procedure or on substance, and domestic law primarily determines the question of the competence or the jurisdiction of the tribunals. This difficulty becomes more apparent if we recall that the convention which is intended to be produced on the basis of the Commission's work is clearly a source of obligations in the strict sense and of international law as the term is understood in general usage.¹⁹⁸ Although it is perfectly true that, in the codification and progressive development of international law, draft articles should not, in principle, necessarily be based on national sources, the subject of state immunity, more than any other subject, does require that it should be so based. As mentioned in Chapter One of this work, the rule of state immunity was primarily and initially

enunciated by the judicial decisions of various legal systems and that treaty practice, national legislation and opinions of jurists are of subsequent growth. It is an area in which the relationship between municipal law and international law is directly relevant. It is, therefore, a difficult task for the Commission to isolate the concept of public international law from those of private international law and of private law.¹⁹⁹

These difficulties can only be overcome by analyzing, as far as possible, the various sources of the different legal systems with a view to identifying the general principles of law applicable by various legal systems. This would bring the Commission's work close to the words of Art. 38(c) of the Statute of the International Court of Justice and thereby discharge the Commission's main functions by basing its draft articles on the sources of international law.²⁰⁰

A further difficulty concerning the Commission's work was the task of distinguishing ratione materiae between commercial activities and activities that genuinely come within the context of state exercise of its sovereign powers. Perhaps an even more serious difficulty was that the various groups of states held divergent and even conflicting views as to what in the contemporary international legal system the states should have as sovereign functions. The states which subscribed to the supremacy of market forces obviously wished to restrict the concept of the state, whereas the rest of the world adhered to the view that, in a complex contemporary international society, the state faces a wide ranging and ever increasing function in order to achieve the economic and social development of their respective peoples.²⁰¹ Some other members expressed the view that, despite the difficulties inherent in making such a distinction, it would still have to be taken into consideration, not as a clearly defined formula, but rather as a general guideline.²⁰² Others have firmly adhered to the distinction,²⁰³ and of course it is categorically rejected by the proponents of absolute immunity. In the sixth committee's debates on the work of the Commission, strong objections were raised against

the application of any such distinction by the representatives of all socialist states and some of the developing countries.²⁰⁴ It seems, however, that in a spirit of compromise, the Commission refrained from drawing the distinction.²⁰⁵ The distinction appears to be feasible only in regard to individual rules, and not to the whole Convention.²⁰⁶ Furthermore, despite the necessity of, and the conveniences afforded by, the distinction, it would be futile for the Commission to undertake any such efforts in view of the comments already made by various states regarding the unacceptability of the distinction.

These are some of the major difficulties that the Commission has had to address in discussing its set of the draft articles at the second reading after receiving the comments of governments on the draft articles already provisionally adopted. It is on the basis of these points that further work on the subject could be usefully pursued by the Commission, and on the resolution of these problems that the acceptability of any international instrument on the subject depends. If codification is a satisfactory method of dealing with problems with such great difficulties, it may be preferable to await the result of the Commission's work on these and other issues.

Several writers have expressed their doubts whether an international instrument on state immunity would have any prospect of universal application; and that the Commission would have difficulty in finding widespread acceptance for any instrument it succeeded in formulating and the whole exercise would lose any practical significance.²⁰⁷ It has been observed that the differences among the members of the ILC are so prominent that they will surely limit the prospects of success.²⁰⁸

Professor P.D. Trooboff, in his valuable lectures at the Hague Academy, suggests a "fresh approach" to the problem by proposing the adoption of an international instrument that would regulate "the procedural aspects of foreign state immunity and with the formulation of only a limited number of rules related to such

procedural issues".²⁰⁹ He takes the view that experience in the codification of the rules of private international law has shown that the likelihood of the success of a convention that deals with procedural aspects is greater than in the case of substantive rule, and he proposes that such a project could be entrusted to the Hague Conference of Private International Law. As to the relation between the ILC document and the proposed convention, Professor Trooboff suggests that the latter could perhaps serve as a protocol for the former. He sees little prospect of the emergence of a convention even within the next 25 years, and concludes:

In short, I submit that gains in the foreign state immunity field will continue to be made by small steps and not by the great leap forward that a multilateral substantive convention would represent. 210

III. RESTRICTED IMMUNITY IN OPINIONS OF WRITERS

There is a rich legal literature on the doctrine and practice of states on the restricted view of immunity. The preceding survey of the codification efforts has demonstrated the considerable influence of the restrictive trend of immunity in the various endeavours of codification undertaken by almost all of the international bodies charged with codification and quasi-codification of rules of international law. If it has been reasonably claimed that one could not speak of a communis doctorum on the subject in the 19th and early 20th centuries, the same cannot be held to be entirely true at the present stage of development of the law, where the restrictive view has gained a central place in modern international law literature. A glance at the contemporary legal opinions will reveal that there is much less support for the absolute doctrine of immunity.²¹¹

Apart from the writings of socialist jurists, modern writers on international law, largely, if not overwhelmingly, support the restrictive theory of immunity. Recently publicists have increas-

ingly adopted this theory. Prominent among proponents of this trend may be mentioned: Bluntischli,²¹² Sir R. Phillimore,²¹³ J.Y. Brinton,²¹⁴ J. Garner,²¹⁵ J.G. Hervey,²¹⁶ W. Bishop,²¹⁷ W. Friedman,²¹⁸, J.E.S. Fawcett,²¹⁹ E. Loewenfeld,²²⁰ P.B. Carter,²²¹ Judge H. Lauterpacht,²²² Sir Ian Sinclair,²²³ and many others.

As mentioned earlier, the most powerful argument adduced against the restrictive doctrine of immunity is the absence of a workable criterion by which immunity could be restricted. This, to some extent, is true: the writers who adopted the restrictive theory are not unanimous as to this criterion. Some of them have suggested what is commonly known as the subjective test,²²⁴ which bases immunity on the capacity, personality or status in which the government may act. Others have argued in favour of a more objective test. They propounded that it is neither the object of the transaction nor the person of the actor, but the nature of the transaction that determines whether state immunity should be accorded.²²⁵ Various terminologies have been used to refer to the distinction in question. For example, a distinction has been drawn between "political acts and acts of administration", "public and private law nature of state acts", "governmental and non-governmental acts" and "sovereign and non-sovereign activities". Even this seemingly objective test has proved to be hardly helpful in some cases, such as contracts of employment, state loans and state railways administration.²²⁶

This distinction between various acts of foreign states seems to be based in the first place on the dual personality of the state and, secondly, it appears to have been derived from analogy with the classification of acts of personal sovereigns and diplomats. It has been said that theories of states differ and there is no unanimous agreement that the state cannot be divided into different personalities. If a comparison can be drawn between private individuals and foreign states, the former are less divisible, and yet the law is capable of distinguishing between their private and official acts, as in the case of diplomats, and thereby a question

might rightly be asked, If it has been possible to distinguish between the official and private functions of the individual, why should such a distinction not be made in the case of a state as well?²²⁷ But this analogical deduction seems to ignore the fact that it is not always valid to classify conduct of states on the same basis as acts of individuals.

Some writers believe that the difficulties caused in practice by the application of the latter test do not by themselves exclude general agreement to admit the rule. They argue that, since the rationale on which the distinction is based is sound, the doctrine should be followed as closely as permitted by the difficulties that will inevitably arise in specific cases.²²⁸ It appears that neither the objective nor the subjective test provides a workable criterion regarding the proper scope of state immunity and, although the nature test is more objective than the purpose test, it is similarly open to doubt. However, writers on the subject have criticized the logical basis of the distinction and have begun to suggest alternative approaches to this problem. For example, Professor Higgins has correctly asked whether the objective test furnishes a sound basis for the determination of whether a foreign state should be granted immunity for a particular act.²²⁹ She seems to prefer the adoption of the distinction established in the civil law jurisdiction, between public and private law acts, in order to find a firm basis for this key issue. The same suggestion was closely followed by the American Law Institute in preparing a Revised Statement of the Foreign Relations Law of the United States.²³⁰ The Revised Statement adopts in S.451 the restrictive immunity approach by using the test "whether the acts in question are of the kind that may be carried on by private persons". It is clear that both suggestions follow a dual approach by combining both the nature and purpose tests in one formula.

The issue was also addressed by Professor James Crawford,²³¹ who makes the following points:

1) The term 'commercial' is not sufficiently comprehensive or precise in its meaning to include the variety of situations in which activities of a foreign state are non-governmental and cannot attract immunity.

2) The definition of 'commercial transaction', which occupies a prominent place in national legislation, is much less elaborate and therefore leaves more room for judicial interpretation.

3) The single 'nature' approach is described as a "hallowed formula" and how one is supposed to classify the nature of a particular human activity without reference to purpose is unclear. The nature of the activity is not some abstract idea (certainly not for legal purposes), but rather the focus, relevant or "central" according to some criteria. The classifications "governmental" and "commercial" are themselves purposive.²³²

4) It is suggested that commercial acts can be largely defined by isolating the relevant purpose by examining: "the relevant acts of the foreign states on which the claim is based".²³³ Another approach to determine the commerciality of the act was also suggested. This was to allow the court to determine the nature of the act by asking whether the act was profit-oriented and whether, in fact, the foreign state will realize a profit from the transaction concerned.²³⁴

Recently, Professor Ian Brownlie has surveyed the whole field of jurisdictional immunities and has attempted to pinpoint what are termed critical elements:

1) If the implementation of state policies necessarily involved the making of transactions within the context of a system of local law, including reference to commercial arbitration, the state takes the risk of accountability within that system of local law.

2) Such accountability is compatible with the principle of consent, since the foreign state could always choose to avoid such

transactions; it became a 'visitor' to the jurisdiction at its own choice and could always stipulate for treaty performance of servicing operations.

3) Such accountability within the system of local law is justified by certain general principles of law and in particular by the principle of good faith, reliance and unjust enrichment.

4) Given the private law character of the transactions, municipal courts provide the appropriate forum.²³⁵

It is clear that Professor Brownlie is suggesting a new technique that would be based on territoriality, i.e. the exercise of jurisdiction by the local courts takes the form of express or implied consent of the sending state by the voluntary entry into a legal relation under national law and on an equal footing with non-state entities. While distinctions would still need to be made under this approach for handling an immunity issue, Brownlie thinks that this will at least mitigate the problems arising from distinguishing private and public acts.²³⁶ The same line of reasoning appears to have been adopted by Professor Singer,²³⁷ who argues that: "So far as is possible the doctrine of restrictive sovereign immunity should be analysed in terms of jurisdiction to subscribe rules of law".²³⁸

Another criterion which deserves mention is that of trading activities. Among the writers who adopted this view are Friedman,²³⁹ Fawcett,²⁴⁰ and Wolfman.²⁴¹ Some of them rejected the distinction based on the dichotomy of state activities on the ground that these distinctions:

do not take account of a number of difficulties. First, *imperium* denotes legal capacity, under constitutional or international law, to perform an act of state or conclude an international agreement; but the performance of a non-sovereign act, *jure gestionis*, may also be in the exercise of a public function. ²⁴²

The core of their argument seems to be the proposition that activities relating to state trading are outside the ambit of the

rule of state immunity and they then proceed to justify this exception.²⁴³

At any rate, this is an area in which legal opinions differ largely and there is little hope that a legal doctorum would manage to find a unanimous objective test which in all circumstances would separate questions arising jure imperii from those arising jure gestionis. It is well known that many writers have tried in vain for many years to find a test that would permit the making of the kind of distinction in question and the continuation of that search will undoubtedly be at the root of the problem of state immunity.²⁴⁴ However, a better view seems to be that it is advisable to identify certain areas of activities to which immunity would not lie without reference to the dichotomy in question and then cogent justifications be adduced as a rationale for these alleged exceptions. The precise delimitation of these areas will be left to be determined by state practice, since the law on the subject has been, and is still, rapidly developing.

A number of relatively recent writers who have adopted the criteria of commercial activities have justified their view on the following basis:

1) There is nothing approaching absolute immunity in international law.²⁴⁵

2) Sovereign immunity "is fast becoming an anachronism as far as traders are concerned".²⁴⁶ If a state wishes to trade internationally, it has to be answerable before the law. If immunities could be granted to a state engaging in commercial activities, international trade would be severely hampered. "The ultimate principles", stated Professor Hyde, "which should be accepted by the nations must serve to safeguard and promote, rather than to jeopardize and retard the commercial transactions of private concerns with foreign states".²⁴⁷ The inequities which might be produced by allowing sovereign immunity to apply are also observed by Fensterwald who noted that private individuals dealing with

state traders may shy away from dealing with foreign states if their legal rights and remedies are so curtailed by the rule of state immunity.²⁴⁸

3) Another argument for restricted immunity may be based on the principle of implicit waiver. It is claimed that it is entirely consistent with modern international law not to allow the principle of sovereign immunity to prevail in cases of commercial activities of foreign states. It has been said that this is not a matter of principle, but of practicality. Experience has shown that when a foreign state enters a free or or relatively free market, it consents expressly or implicitly to waive any state immunity in regard to its commercial activities.²⁴⁹

4) The last and final argument may be based on the criticism directed against the absolutists who relied on the doctrine of equality of states. The proponents of the restricted immunity asserted that, if trade is carried out by states, there may be a perfect case for equality, but inequality might well arise if a state traded with a private individual who might be deprived of his legal remedies. Using the same doctrine of equality, they argued that forum states are equally entitled to exercise their territorial jurisdiction and allow direct recourse by private entities against all their trading partners whether private or public.²⁵⁰ This seems to be a sound argument because, to insist on full immunity to apply in all circumstances, is simply to ignore reality and to render the concept of sovereign equality illusory since states are not only equal in rights but also in duties. Furthermore, to extend that principle to a transaction between a state and non-governmental entity is a departure from that principle of equality rather than an application.

It is due to the difficulties thus involved that some writers have suggested the abolition of the principle of state immunity. Judge Lauterpacht had proposed the abrogation of state immunity, yet had recognized four exceptions: (1) legislative acts; (2) administrative acts; (3) state contracts that lie outside

jurisdiction under rule of private law; and (4) cases of diplomatic immunities.²⁵¹ He explained the restrictive view of his proposal in the following words: "by placing, subject to the above safeguards and exceptions, foreign states in the same position of subjection to the jurisdiction of courts which it [local state] occupies in the matter of actions brought against itself".²⁵²

Whatever the merits of the assimilation proposed by Judge Lauterpacht, it must not be forgotten that, by closing the front door against state immunity, Judge Lauterpacht had in fact allowed state immunity to enter through the back door, since the suggested safeguards and exceptions are capable of wide interpretation.²⁵³ Moreover, by enumerating acts which are to attract immunities, and excluding others which are not, Judge Lauterpacht had given a new version of the distinction which he himself considered unworkable, namely the varied activities of states.²⁵⁴

Other writers adopt the view that, between the two extremes, absolutists and restrictionists, lies an area of compromise in legal theory, namely the so-called principle of reciprocity. Using this principle, it has been argued that the gap between the two extreme views can be bridged or at least narrowed. This theory is based on the idea that each state is simultaneously a 'claimant' and a 'recipient' of immunity: a claimant in the sense that it claims its own immunity before a foreign court in which it is directly or indirectly impleaded.

According to this argument, the question of immunity has dual aspects, the active aspect where the state is granted or denied immunity to other states before its own courts, and the passive aspect where the state is granted or denied immunity before foreign courts. The doctrine of reciprocity may thus step in and operate as follows:

a state which professes adherence to the doctrine of absolute immunity but finds itself subject to the jurisdiction of foreign states in various parts of the world, realizing that it is powerless to change its unfavourable passive position, would have no recourse but to change its active position by denying immunity to foreign states in those cases where the state

itself would be denied immunity before the courts of those foreign states. 255

However, although the notion of reciprocity is operative in many spheres of international law,²⁵⁶ the argument that it can be used to modify the rule of state immunity is altogether too simplistic and runs counter to the object of international law.²⁵⁷ The reasons which may be advanced in this regard are: in the first place, the effectiveness of the principles depends on the existence of a uniform jurisprudence to serve as guidance to the courts. In the second place, the interests involved are not simply those of the states concerned, but also of private litigants. Since immunity bars the remedy of any potential private litigant, the fact that a foreign state, against which he wishes to proceed, would grant immunity to other states in a similar situation does not seem relevant.²⁵⁸ But that does not mean it would be contrary to international law for a state to apply a condition of reciprocity but the application of such a principle seems largely to ignore the interests of private litigants. In the third place the jurisdictional issue is basically determined by reference to the fact that one state will not sit in judgement on the acts of another state done in its public capacity. Such abstention from jurisdiction is required irrespective of reciprocity. In the fourth place, the notion of reciprocity would appear to contradict the principle of universality of the law in the sense that, under international law, states have parallel rather than reciprocal obligations and duties.

At any rate reciprocity is not an essential element of state immunity. But it has to be borne in mind that it has a very important role to play in the development of application of the principle of state immunity, a role which would in effect restrict the application of that principle. Since states such as India and the USSR accorded immunity from jurisdiction on reciprocity, it seems that the growing inter-independence of the world, coupled with the increasing prevalence of restrictive practice, would lead inevitably to an ever larger number of cases in which such states would withhold immunity.²⁵⁹

IV. THE EMERGING TREND OF RESTRICTED IMMUNITY AND CURRENT CUSTOMARY INTERNATIONAL LAW

The question to be answered in this section is what is the current rule of international law with respect to state immunity? While there is a clearly "emerging", if not "emerged" trend towards restricted immunity, the question to be posed is, have the considerable changes that have occurred in the law in the last 50 years or so now come to an end? If not, are they continuing because of inertia or for some good reason? To answer these questions, the legal foundation of the restricted immunity principle in contemporary law deserves the closest attention. There is no doubt that the prevention of conflict between the conduct of one state and that of another state is the primary object of international law, including the rule of state immunity in the widest sense. The principle of state immunity is primarily concerned with the consequences of contact between two equally inflexible, apparently equally exclusive sovereignties: the sovereignty of the state invoking immunity and that of the second state seeking to impose its jurisdiction on the first. Thus the rule of state immunity does not aim to avoid conflict, but to determine which authority might sit in judgement over the conduct of one state carrying on activities within another. The question is whether the existing rules of international law provide the answer in terms of strict rights and obligations of states to the variety of situations which the issue of state immunity gives rise.

Although there are abundant judicial decisions of domestic courts on the subject, decisions of international courts or arbitrators are totally lacking. This virtual absence of international adjudication has been attributed to two main reasons: (a) the refusal by a local court to accord immunity to a foreign state would not in itself result in damage to that state; and (b) even enforcement of decisions by a local court is of little significance in practice to the state whose immunity has been

denied.²⁶⁰ This singular absence of international adjudication does not mean that the subject is not regulated by international law. If a comparison can be drawn in this regard between state immunity on the one hand and diplomatic and consular relations on the other, the latter receives little or no international judicial pronouncement until 1980 in the Hostages case.²⁶¹ Again many of the questions that arise in practice are a matter of comity, since they involve principles rather than the kind of strict rules that provide an answer in each and every case. As a consequence of this dearth of international judicial pronouncements on state immunity, it is difficult to identify rules of international law in the matter. Admittedly, there are very few rules of that kind concerning the relation between one state and the national legal order of another state. For example, there has been obiter dictum in the Lotus case (1927)²⁶² to the effect that international law left the state with a wide measure of discretion in applying its laws to matters that occurred outside its boundaries. It was stated in the judgement that:

It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and on which it cannot rely on some permissive rule of international law. 263

The same judgement also established the basic rule that a state cannot exercise its sovereignty in the territory of another state.²⁶⁴

The 1958 Law of the Sea Convention²⁶⁵ preferred to use the recommendatory 'should' rather than the mandatory 'shall' in regard to the jurisdiction of the coastal states concerning foreign ships passing through their territorial waters. Consequently it seems that, since the jurisdiction of a state is not sufficiently regulated by international law, one would not expect state immunity to be so exhaustively governed, for immunity is a corollary to jurisdiction and in most cases follows it.²⁶⁶

The rules of international law on state immunity and waiver might also well be based essentially on a series of presumptions of consent. For example, the territorial state is free to admit or not to admit the activities of foreign states. Once it has allowed them, then the territorial state's consent is presumed and this presumption produces certain consequences, including abstention from exercising jurisdiction.²⁶⁷ Again, a state which consents to receive an ambassador, thereby agrees to extend the appropriate immunities to that ambassador and to the state he represents. The same presumption, however, could equally be used in other directions. For instance, when a state agrees with another state to conduct commercial activities within its territory, its consent could be made conditional on non-immunity for the other state or its entity, and it is thus bound to comply with all the relevant substantive rules and also to accept the machinery set up to enforce those rules. There are no rules of public international law to regulate such consent and very little has been written on the subject.

It appears that, in the light of the above observations, the principles of public international law that regulate the conduct of one state within the territory of another are very few and rather weak. The only established principle appears to be that of territorial sovereignty. Sovereignty, as explained by M. Huber in his famous award in the Island of Palmas case,²⁶⁸ is essentially territorial and "includes certain powers to be exercised in regard to a particular limited territory unimpeded by any interference from outside". The same principle was corroborated in the North Atlantic Coast Fisheries case: "One of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is coterminus with sovereignty",²⁶⁹ and reaffirmed by the International Court of Justice decision in the Corfu Channel case²⁷⁰ as "an essential foundation of international relations". Viewed in this sense, sovereignty and territorial jurisdiction of states become

interchangeable terms.²⁷¹ This essential and well established principle seems to favour the restrictive view of immunity. In this regard, immunity is an exception to this general rule and must for these reasons be restrictively interpreted. The word immunity itself suggests that there is a valid territorial jurisdiction which may be relinquished in certain specific cases.

In dealing with the emerging trend of restricted immunity from national decisions and state practice, it is necessary to be careful not to go too far in identifying the details of this emerging trend since what is the current rule of international law regarding sovereign immunity "depends greatly on what degree of consensus is sought for the rule being articulated".²⁷² In addressing this issue, it is necessary to emphasize that the subject of state immunity is different from other subjects of international law because state practice in that area is based almost exclusively on domestic legislation, administrative practice and domestic court decisions. Thus international practice has followed a more divergent development than other fields of international law.

The point of departure in any discussion on the existence of customary rule of international law is Art. 38 of the Statute of the International Court of Justice which describes customary rules as "international custom, as evidence of a general practice accepted as law". Relying on this conception, the ILC Special Rapporteur enumerated in a working paper on the International Law Commission Statute, certain elements for the formation of a customary rule:

- i- concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;
- ii- continuation or repetition of practice over a considerable period of time;

- iii- conception that the practice is required by, or consistent with, prevailing international law; and
- iv- general acquiescence with the practice of other states.²⁷³

On the basis of these definitions any discussion of emerging customary rule of restricted immunity has to satisfy two constituent elements namely: (1) material practice and its requirement and (2) the opinio juris, that is to say not only "general" practice but also that it must be "accepted as law".

1. Material Practice

The question what constitutes state practice cannot be answered here; but generally speaking, there is agreement to the effect that:

- i- State practice includes any act, articulation or other behaviour of a state, as long as the behaviour in question discloses the state's conscious attitude with respect to or in recognition of a customary rule.²⁷⁴
- ii- These acts, articulations and behaviour must be attributed to states and not to individuals or international organizations.²⁷⁵
- iii- Such practice must be made publicly known to other states within a reasonable time.²⁷⁶

Instances of state practice have been somewhat widened to include diplomatic correspondence, general declarations of foreign or legal policy, and opinions of national legal advisers. In 1950 the International Law Commission identified the following instances as "Evidence of Customary International Law": treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and the practice of international organizations.²⁷⁷ State practice can also be inferred from the stand taken by a state when sued, or intervening in any way in judicial proceedings before international courts and arbitral tribunals.²⁷⁸

Apart from these generally accepted instances of state practice, there is much controversy as to whether, for the purpose of establishing a customary rule, state practice should consist merely of concrete actions or whether it might also include written or oral statements of state representatives or their vote at diplomatic conferences or international organizations. Again this is an area in which the views of publicists differ widely and there is as yet no agreement thereon. Some jurists have adopted a restricted view of state practice,²⁷⁹ while others have adopted a more liberal interpretation.²⁸⁰ The latter view seems to be more in keeping with the modern theory of customary law: the restricted view of state practice runs counter to the practice of the states themselves; the word practice is general enough to correspond to the flexibility of the law; and the wider sense of state practice renders a great favour to research and study in terms of the wealth of materials made readily available in recent times.²⁸¹

As far as restrictive practice of state immunity is concerned, it cannot be denied that during the last 35 years or so there has been a reasonable wealth of state practice, whether in its restrictive or wider sense, to support the emerging trend towards functional immunity in international practice. Domestic decisions, governmental practice, treaty practice and national legislations in various legal systems sufficiently reflect this tendency. But it is important to see to what extent that practice meets the other criteria of customary law.

In the first place the formation of customary rule requires 'general' state practice. The meaning of the word 'general', as used in Art. 38.1(b) of the Statute of the ICJ, has been given different interpretations. In the ICJ judgement in the Fisheries case (UK v. Norway), the court concluded that the ten-mile rule, although adopted by many states and supported by various conventions and tribunal decisions, had not reached the level of a general rule since other states had adopted different limits,²⁸² and in the North Sea cases the court preferred to qualify state practice as

'extensive' rather than 'general'.²⁸³ At any rate it is clear that the word 'general' refers to the number of states which have to contribute to the formulation of the rule in question. Although there is no hard and fast rule by which such a number can be counted, statistical calculation is not desirable and the term 'general' tends to signify common and widespread practice among many states.²⁸⁴ The brief survey in the preceding chapters clearly shows that there has been widespread practice among a large number of states of restricted immunity since the 19th century, although that practice has been somewhat slow to take its final shape.

It is true that, for historical and political reasons, there has been no practice in some parts of Asia, Africa and Latin America.²⁸⁵ in the 19th century. Various countries belonging to this relatively new world recently started to adjust themselves to the realities and to adopt a more restrictive attitude towards state immunity. It is apparent that the sixth committee of the General Assembly and the International Law Commission have recognized, on the basis of the available state practice, that emerging trend, despite divergent views concerning its scope and application.

The subject of state immunity has been, and still is, rapidly developing. The evolution of the law does not require the active participation of all states. According to a widely accepted view in international law, acquiescence may constitute part of general practice and thus contribute towards the formation or continuous existence of a customary rule.²⁸⁶ The rationale of this constitutive function of passive conduct is based on the fact that not every state is required to engage in an active form in the evolution of the law, and that in certain areas only a few states may actually possess the means of participation in such practice.²⁸⁷ Furthermore, there is hardly any area in international law in which the development has been in a uniform manner. The law invariably has developed by stages and sectorially. This is perfectly true in the case of those states which for some reason have not engaged in the recent evolution of the law of state immunity, although

admittedly absence of practice does not automatically mark their approval or disapproval of the emerging rule, since further qualification, in the form of absence of protest against the rule, is required for such silence to form state practice,²⁸⁸ This absence of state practice in some countries has been taken by some jurists as an insurmountable obstacle in the way of the evolution of the law. It has been argued that the restrictive trend of immunity has been applied in the practice of only certain states forming the international community,²⁸⁹ and it is thus one-sided and geographically limited. Sometimes the argument has been merged with that of the interests of developing countries.

Although there has been no state practice in any sense in newly independent states in the field of state immunity until recently, there is abundant treaty practice in socialist countries accepting at least some limitations to the rule of absolute immunity. The USSR, for instance, from the time of its entry into the world economic system, concluded treaties and trade agreements, and engaged in a pattern of practice under which it did not claim the benefit of state immunity for its commercial activities.²⁹⁰ Professor Crawford has analysed some 40 or so bilateral treaties of the Soviet Union dealing with general or particular questions of state immunity, the great majority of which subject Soviet trade delegations and separate state instrumentalities to the jurisdiction of the forum state in respect of commercial or private law transactions.²⁹¹ He concluded that in no case do these various treaties provide for the exclusion of local jurisdiction and remedies without some countervailing provision, e.g., a guarantee in respect of the transaction or judgement.²⁹²

Moreover, the reference to "international practice" or "international law" in many of these treaties seems to suggest that they cannot be dismissed as mere waivers of an immunity to which the Soviet Union would otherwise be entitled: they simply do not articulate an entitlement of that kind.²⁹³ In the majority of these treaties, while validity of state immunity is recognized, an exception is invariably made with regard to commercial activities.

That would be interpreted either as a deviation from the existing rule of international law or as declaratory of such rule.²⁹⁴ To this extent, these treaties indicate that the rule of state immunity is not a rule of jus cogens, otherwise the conclusion of these treaties would be regarded as a deviation or derogation from that norm, in that they constituted a more cogent support for a restrictive view of immunity.²⁹⁵

However, in considering contestation by socialist countries to this restrictive trend of immunity, one has to bear in mind the effect of silence in this type of situation. Further evidence of that trend is contained in a letter to the Legal Counsel of the United Nations dated 3 July 1979 from the Legal Advisor to the Foreign and Commonwealth Office of the United Kingdom,²⁹⁶ stating that the State Immunity Bill, as presented to Parliament, had been circulated to all diplomatic missions in London and that no state to which the draft legislation had been sent had offered substantial criticism of its terms. The draft was then submitted to Parliament and adopted as law.²⁹⁷

During the discussion on the subject at the International Law Commission, some of the commissioners adopted the view that the trend towards restricted immunity is reflected in only some of the national legislation of developed countries.²⁹⁸ But this assertion is not essentially borne out by state practice. States such as Singapore, Pakistan, Australia and South Africa have followed a similar line. Again, bodies such as the African-Legal Consultative Committee, composed chiefly of legal experts from various parts of Asia and Africa, and the Inter-American Judicial Committee, which is also essentially a body of lawyers from South America, confirmed that state immunity did not exist in a number of cases. It has also been mentioned elsewhere that the International Law Association also includes among its membership legal experts from various parts of the world, developed and developing, socialist and capitalist states.

In addressing this proposition, the Special Rapporteur on the subject, Mr Sucharitkul, has stated convincingly in his fifth report that:

The evolutionary process of the law does not require the positive or active participation of all states. While it cannot exclude any state from participation, absence of practice is no ground for liability of neglect or negligence on the part of states. However, such absence cannot be invoked to invalidate or otherwise downgrade the existing or prevailing practice of which abundant evidence is available elsewhere. 299

He goes on to observe that:

It is easy to say, in the absence of state practice in a given country or without reference thereto, that the law as developed in the practice of so wide a region as Asia, Africa or Latin America points in a definite direction, or is opposite to the prevailing practice in Western Europe, or is in any way similar to the practice of socialist countries.

The Special Rapporteur, however, replied that:

Nothing could be nearly so dangerous as such a sweeping statement A glance at the judicial practice and national legislations of Pakistan, India, Singapore or Japan will reveal a strong trend away from any absolute doctrine. Neither Pakistan nor Singapore can be said not to be Asian, nor to be no longer thriving and developing nations. A brief examination of their legislations will suffice to silence any sweeping statement about Asian practice being identified with that of socialist or capitalist countries. 300

It is admittedly right to say that caution should be exercised in interpreting this virtual absence of practice in some countries, but it could equally be argued with some force that the absence of practice does not necessarily mean that it is impossible to identify the emergence of a clear general practice of restricted immunity.

As to the duration of this practice, it must be borne in mind that the concept of immunity of states as an entity which has emerged by almost imperceptible stages from the concept of the immunities of the individual sovereign, is of relatively short standing.³⁰¹ However, it is doubtful whether under the modern theory of customary international law any extensive or fixed time limit is required for the formation of the customary rules. As early as 1950, Judge Hudson, in his working paper on the Statute of the International Law Commission, suggested "a considerable period

of time".³⁰² Others have proposed the formula of "from time immemorial".³⁰³ The contemporary jurisprudence of the ICJ seems to move towards a more flexible requirement such as "constant practice" without stipulating a rigid time limit,³⁰⁴ and that tendency was unequivocally endorsed in its decision in the North Sea cases.³⁰⁵ Following the jurisprudence of the court, most authors seem to adopt the view that the time required for the formation of customary law is a relative qualification, and that customary rules may emerge within a comparatively short period of time.³⁰⁶ Thus, the argument that the emerging restricted trend of immunity is of relatively short standing in international law seems to be somewhat flawed. Cases in which immunity of states is limited go back to the 19th century and this trend continues to apply in view of the increasing number of cases in which states are involved as traders and with the increasing prevalence of functional practice.

2. Opinio Juris

The other reason why state practice might not rise to the level of customary international law, even assuming the near universality and consistency of such practice, is that while the material element - actual practice - is present, the psychological element - opinio juris - might not be. In other words, the behaviour of states might be explained by considerations of comity rather than obligations.

This requirement is clearly expressed by Art. 38(1)(b) of the ICJ Statute that the "general" practice must be "accepted as law". The importance of the opinio juris for the formation of customary law has been judicially endorsed by the PCIJ and its successor the ICJ. As early as 1927, the PCIJ had expressly affirmed this qualification by stating that the abstention on the part of Turkey to assume jurisdiction in criminal proceedings would only be elevated to the level of customary law if such abstention "were based on the state being conscious of having a duty to abstain".³⁰⁷ The ICJ had unequivocally required the presence of such opinio juris when it articulated that the party relying on a customary rule to

prove that the constant and uniform usage in question "is the expression of right and a duty incumbent" on the other.³⁰⁸ Any doubt that might have existed regarding the position of the requirement for the purposes of customary law was dispelled by the decision of ICJ in the North Sea Continental Shelf cases.³⁰⁹ The court laid down the requirement in the following words:

The acts concerned must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. 310

The requirement can be established in the reverse direction. In the recent Nicaragua case, the court notes that there is in fact evidence of agreement between the parties as to the content of the customary law relating to the non-use of force. Nonetheless, the court observed that this concurrence of views does not discharge the court from ascertaining what rules of customary law are applicable. Insofar as these rules are concerned, the court stated:

The mere fact that states declare their recognition of certain rules is not sufficient for the court to consider these as being part of customary international law The court must satisfy itself that the existence of the rule in the opinio juris of states is confirmed by practice. 311

Thus, instead of confirming the practice by the opinio juris, the court required that opinio juris must be confirmed by state practice. These are different ways of saying the same thing.³¹² It has been rightly said that there is no 'psychology' of state and the requirement is legally relevant only to the extent it is discernible by other states.³¹³ It is regarded as a "slightly obscure way" of asking whether a practice is law, or mere usage or comity, or even accidental.³¹⁴

In this connection it might be argued that states engaged in restrictive practice are motivated by the desire to protect their own interests and the interests of their nationals by insisting that their subjects are allowed to have direct recourse to local courts when foreign governments are involved. This argument, however, is

altogether too simplistic, since the state of the forum, by engaging in such practice, has implicitly waived its immunity from jurisdiction if sued before a court of a foreign state. In other words, a state which has adopted the restrictive theory of immunity could obviously not invoke the obsolete principle of state immunity before foreign courts concerning its commercial activities. Thus, the motive behind exercising its jurisdiction over other states in commercial acts would seem irrelevant and has little to do with the legal conviction of the state as to the position of the rule under international law.

The crucial point in any discussion of opinio juris seems to be that of determination and ascertainment of such legal conviction. The main criticisms which have been directed against the requirement, as articulated by the ICJ in the North Sea cases, were that the requirement is rigid and there was failure on the part of the court to explain precisely how the evidence of opinio juris is to be ascertained.³¹⁵ Despite these criticisms, writers are not lacking who express the view that the task of ascertaining a legal conviction, however difficult it might appear, yet is feasible. It was pointed out that the alleged "rigidity" must not be taken away from the context in which the disputes in the North Sea cases have arisen, namely: the practice of non-parties to an international instrument embodying customary rule, which in the court's opinion, had not been customary at the time of the adoption of the instrument in question. In this context it was said that: the less conclusive the available material practice, the clearer must be the evidence of opinio juris".³¹⁶

As far as the restrictive doctrine of state immunity is concerned, the same difficulty of ascertainment presents itself in a more acute form. However, some points may be mentioned with a view to mitigating such difficulties as far as restrictive immunity is concerned. In the first place, national courts of various countries, especially the non-socialist states of Europe, had been among the first to recognize that, in certain areas of trade, state immunity would not apply. There appears to be no reported instance

in which the forum states concerned had intervened by legislative means to overrule these decisions in any form, or to adopt a different position on other occasions. In the second place, when the judicial authorities of some countries had revived the restrictive theory after a period of uncertainty, i.e. the United Kingdom and United States, their respective countries had responded to the realities of the situation, albeit slowly, and adopted legislation in line with the views expressed by the judiciary. The adoption of such legislation strongly supports the existence of a legal conviction on the part of those states that what they engaged in was legally binding as law. The same appears to be true in regard to other countries who have adopted similar enactments, although not to precisely reflect locally developed rules, but simply to provide for what they genuinely believed to be the law. In the third place, some of these legislations have clearly been adopted to provide for a judicial adjudication of issues of state immunity away from any political or quasi-political determination. For example, before the adoption of the United States Foreign Sovereign Immunity Act 1976, the United States Department of State used to employ panels of attorneys to advise on requests of state immunity. When the Act was adopted, it was pointed out that the intention of the Congress was to codify the so-called restrictive principle of immunity as currently recognized by international law. Most significantly, it was stated that the intention of the Congress was to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implication of sovereign immunity determination and assuring litigants that crucial decisions are often made on purely legal grounds.³¹⁷ Reference to current "international law" and attempts to avoid "foreign policy implications" in the congressional debates stand as a good source from which opinio juris may be derived in individual cases.

The difficulties of ascertaining opinio juris in the evolutionary trend of restrictive immunity are further mitigated in the context of the U.N. drafting process. Various multilateral treaties have been concluded within the United Nations framework,

regulating some aspects of the law of state immunity. Some of them have expressly drawn a distinction between commercial and non-commercial activities, while some others have drawn a distinction between the official and private functions of state representatives. Statements made by the states, disclosing their conviction as to the status of these rules in customary law, are highly relevant. A vote cast in favour of one of these rules may also act as a pointer and serve as an indicator of the existence of such opinio juris. Thus the abundant and easily accessible records of the International Law Commission, the Sixth Committee of the General Assembly and the diplomatic conferences convened to adopt these instruments, render obsolete the problem of the paucity of states' statements and expressions of conviction. In the light of these considerations and in the context of consistency of state practice, it is not an exaggeration, as some writers have exaggerated, to assume the existence of the opinio juris and then only require negative proof as to the absence of the opinio juris.³¹⁸

So far we have identified and discussed the status of the restrictive theory of immunity in the light of contemporary customary international law. The main problem is usually associated with that of ascertainment, which is caused by the scarcity of extensive diplomatic practice and the lack of international adjudication on the subject. But in the light of the available decisions, treaty practice, national legislation and other governmental practice, it can be safely assumed that a rule of customary law exists to the effect that state immunity is not absolute and is subject to some limitations, especially in regard to activities of foreign states in trade and commerce generally. In the revised restatement of The Foreign Relations Law of the United States: "though there are differences of detail in its application, nearly all non-communist states now adhere to the restrictive theory".³¹⁹ The same conclusion was reached by The Australian Law Reform Commission when it proposed the Australian Foreign State Immunity Act 1986.³²⁰ As stated earlier, a number of scholars, after analysing the issue, have agreed to this conclusion, although

they have expressed their deep concern about its application. For example, Professor Brownlie notes that:

While it is easy to register the trend toward a restrictive principle of immunity, it is difficult as yet to see a new principle which would satisfy the criteria of uniformity and consistency required for the formation of a rule of customary international law. 321

It appears that Professor Brownlie is influenced by the fact that there are no unanimously agreed principles which would permit the making of the distinction between governmental and commercial acts, something which falls within the judicial discretion of each forum.³²²

Professor Crawford, while admitting the absence of any rule of international law recognizing absolute immunity, nevertheless observed the lack of agreed principle for making that crucial distinction.³²³ He seems to favour the approach adopted by several of the national legislative acts to overcome this inherent difficulty by laying down certain specific acts which are excluded from sovereign immunity. He expresses himself in the following terms:

[t]he better approach is to deal with the specific categories or classes of case that have arisen in practice and to elaborate specific rules for each such category, taking into account the reason for extending immunity, or asserting jurisdiction in that context. 324

References - Chapter Two

1. This process was adopted in a number of cases. cf. *Ex parte Peru*, 318 U.S., 578, 588-9; *Republic of Mexico v. Hoffman*, U.S., 324 30, 35-6; *Republic of Mexico v. Schmuck*, N.Y., 293 267, 272.
2. 342 U.S., 35.
3. See A.B. Lyons, "The Conclusiveness of the 'Suggestion' and Certificates of the American State Department", BYBIL, XXIV (1947), 116, pp.139-45.
4. Department of State Bulletin, 26, No. 678 (23 June 1952), 985.
5. See, for example, Bishop, "New United States Policy Limiting Sovereign Immunity", AJIL, 47 (1953), 93; "The Jurisdictional Immunity of a Foreign Sovereign", YLJ, 63 (1954), 1184; M. Cardozo, "Sovereign Immunity: The Plaintiff Deserves a Day in Court", Har.L.Rev., 67 (1954), 608.
6. 348 U.S., 356.
7. See Tentative Draft No. 2 in Department Bulletin, May 8, 1958, which states that: "The rule that the foreign state may be sued in connection with its commercial activities may be meaningful only if the resulting judgement can be satisfied from property actually used in the commercial operations" (Sec. 55, p.183).
8. See P. Jessup, "Has the Supreme Court Abdicated One of Its Functions?", AJIL, 40 (1946), 168-72.
9. 348 U.S., 355.
10. Ibid., 364.
11. ILR, 32 (1966), 127-37.
12. Ibid., 351 (1967), 110-21.
13. ILR, 53 (1979), 291-3.
14. ILM, 10 (1971), 1038-45.
15. 425 U.S. 682.
16. See Congressional Committee Report on the Jurisdiction of the U.S. Courts in Suits Against Foreign States, ILM, 10 (1976), 1398, at 1402.
17. For example, in *Duke of Brunswick v. King of Hanover* case discussed above, Lord Langdale M.R. could only say that "No case has been produced in which, upon the question being properly raised, it has been held that a sovereign prince, resident within the dominions of another prince, is exempt from

the jurisdiction of the country in which he is", (6 Beav., at p.40). Brett L.J. said in the case of Parlement Belge, "that the public property of a government in use for public purposes is beyond the jurisdiction of the courts and that principle puts all the public movable property of a state, which is in its possession for public purposes, in the same category of immunity from jurisdiction as the person of a sovereign" (1880) 5 P.D., at 213).

18. For example, "Ramava" (1941), A-D. (1941-1942), Case No. 40. This was an Irish case in which Justice Hanna withheld immunity and took the view that Sir Robert Phillimore in the "Charkieh" (1873) was never overruled.
19. [1952] 1 ALL E.R., 572.
20. Ibid., 1261, at 1268; see also LQR, 68 (1952), 293-4.
21. "The Law of Sovereign Immunity: Recent Developments", RDC, op. cit., 146. For the concept and its content see commentary to Draft Article 9 in Mr Sucharitkul's Third Report, YBILC (1981), Vol. II, Part One, 144-6, paras. 59-70.
22. (1951) 2 K.B., 1003.
23. cf. The Jupiter, [1924] A.C., p.236, per Scrutton L.J. at p.243.
24. [1955] A.C., 72.
25. See U.S. and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England [1952] A.C., 582, per Earl Jowitt L.C., at 602.
26. [1958] A.C., 379; [1957] 3 ALL E.R., 441, correctly described by Mann as "trail blazing" in LQR, 92 (1976), at 166.
27. [1958] A.C., at 418.
28. [1975] 92 1 W.L.R., 1485.
29. Ibid., 1490-1.
30. [1976] 2 W.L.R., 214.
31. See [1977] A.C., at 402; [1976] 1 ALL E.R., 95.
32. [1977] ALL E.R., 881.
33. Ibid., at 897.
34. Ibid., at 908.
35. Ibid., at 893-4.

36. Cf. his decision in Thakrar's case where he adopted the 'transformation' doctrine, [1974] 2 ALL E.R., 261, 266, criticised in a note by White in ICLQ, 23 (1974), 866.
37. In an interesting opinion by Johnson, AYBIL, 6 (1974), 1, the writer viewed Lord Denning's judgement as "characteristically lucid, he boldly, if illogically, tackled the doctrine of restrictive immunity as the first issue to be decided" (at p.23). See also a note by Marksini in Cam.L.J., 36 (1977), 211-6. The assessment of the contribution of the judgement to the law on the subject was examined also by White, ICLQ, 26 (1977); and O. Adede, "The U.K.: The Doctrine of Absolute Sovereign Immunity", BJIL, 4 (1980), 187.
38. See Sir Ian Sinclair, RDC, op. cit., p.155. The then Attorney-General of Nigeria, who was involved in the dispute, said that he was obliged to abandon the idea to appeal to the House of Lords, partly because of a feeling that the House of Lords was unlikely to overrule Lord Denning and partly because of the enormous cost of litigation in the House of Lords. See the statement of Chief Akinjide in YBILC (1984), Vol. I, 118, para. 16.
39. [1981] 1 ALL E.R., 1064; see the judgement of Lord Wilberforce (pp.1066-78), Lord Edmond-Davies (1080-2), and dissenting opinion of Lord Diplock (1078-80), on the one hand, and of Lord Kieth and Lord Bridge (1082-3), on the other, both in favour of allowing the appeal; see also the decision of the Court of Appeal (Lord Denning and Lord Waller), ibid., I, 1092.
40. Ibid., at 110.
41. [1981] 2 ALL E.R., 1076-8.
42. For a valuable comment on the various aspects of the case, see Rosalyn Higgins, "Recent Developments in the Law of Sovereign Immunity in the U.K.", AJIL, 71 (1977), 423. at 431-2..
43. See generally, Sir Sinclair, op. cit., pp.170 et seq.
44. See Morettet v. Governo Danese, cited in the H.D., op. cit., pp.481-482; Guttievs v. Elmilik (1886); Hamspohn v. Bey di Tunisi (1887) and other cases cited in H.D., op. cit., pp.130-131.
45. See Carlo d'Austria v. Nobili, A-D. (1919-22), Case No. 90, p.136.
46. Cited and translated in H.D., op. cit., p.480.
47. See ILR, 22 (1955), 240.
48. See the decisions cited in Materials on Jurisdictional Immunities of States and Their Property, United Nations Legislative Series, United Nations Publications, ST/LEG/SER.B./20, Sales No. E/F.81.V.10, pp.325-37.

49. See S. Sucharitkul, "Immunities of Foreign States before National Courts", RDC, 149 (1976-I), 130-2.
50. See Erik Suy, ZaoR, op. cit., pp.660-92.
51. See Joe Verhoeven, "Immunity from Execution of Foreign States in Belgian Law", NYBIL, X (1979), 73-84.
52. A-D. (1938-40), Case No. 95, p.289.
53. See the cases cited by Allen, Before French Courts, op. cit., pp.7-12.
54. A-D. (1919-1922), Case No. 83, pp.122-4.
55. Cited in H.D., op. cit., p.483.
56. See, for example, Etat roumain v. Pascalet et cie (1924), A-D. (1923-1924), Case No. 68, p.132.
57. See Sucharitkul, op. cit., pp.152-61. See also J.G. Castel, "Immunity of a Foreign State from Execution: French Practice", AJIL, 46 (1952), 520.
58. A-D. 19 (1952), Case No. 42, p.202.
59. ILR, 22 (1955), 224 (Paris Court of Appeal); ILR (1972) 44, 74 (Judgement of Cour de Cassation, of 19 December, 1961).
60. Societe Transshipping v. Federation of Pakistan, ILR, 47 (1974), 150.
61. Etat espagnol v. Societe anonyme de l'Hotel George V, ILR, 52 (1979), 317.
62. See the important decision in Administration de chemins de Fer du Gouvernement Iranian v. Societe Levants express transport, ILR, 52 (1979), 315; see also Sinclair, op. cit., pp.170-5.
63. See Sinclair, op. cit., p.175.
64. Arab Republic of Egypt v. Southern Pacific Properties Ltd. et al. (1984), ILM, 23 (1984), 1048.
65. For an interesting account of the regulation of the conduct of arbitration by the courts of the forum state, see Australian Law Reform Commission, Report 24, Foreign State Immunity (Canberra: Australian Government Publishing Service, 1984).
66. Societe Ewodif v. Republique Islamique d'Iran, ILM, 23 (1984), 1062.
67. Ibid., p.1069.

68. G.R. Delaume, "Recent French Cases on Sovereign Immunity and Economic Development Activities", FILJ, II (1987), 152, in which the writer compares the decision with the provision of FSIA, namely S.1610(c) and (d), which prohibits pre-judgement attachment in the absence of an express waiver of immunity.
69. Delaume, op. cit., p.156.
70. S.1810(a).
71. Hwezer v. Kaiser-Franz Joseph-Bahn, cited in Harvard Draft, op. cit., pp.533-534; see also Allen, The Position of Foreign States Before German Courts (New York, 1928).
72. See Sucharitkul, State Immunities, op. cit., pp.83-5.
73. See, for example, the Visurgis and Sierra, A-D., 9 (1938-1940), Case No. 94, 284.
74. See the cases discussed in M. Domke, "Immunity of Foreign States from German Jurisdiction", AJIL, 48 (1954), 303.
75. See, for example, The Danish Railway in Germany, ILR, 20 (1957), 178.
76. U.N. Materials, op. cit., p.272.
77. Ibid., p.282.
78. X v. Republic of the Philippines, ibid., p.297 et seq.
79. Ibid., p.297; cf. Alcom Ltd. v. Republic of Columbia, [1984] 2 W.L.R., 750 and Birch Shipping Company v. Embassy of United Republic of Tanzania, F. Supp., 507 (1980), 311; ILR, 63 (1982), 524.
80. ZI, XXVIII (1920), 506.
81. Dralle v. Republic of Czechoslovakia, ILR, 17 (1950), Case No. 41, 155, at 163.
82. See, for example, Soviet Distillery in Austria case, ibid. (1954), p.101; and the decision of the District Court of Appeal of Vienna in Amtliche Sammlung case, ibid., 19 (1952), No. 44, 211.
83. See Sucharitkul, his Second Report, Document A/CN.4/331 and Add.1, YBILC (1980), Vol. II, Part One, 224, para. 99.
84. For the text, see USA, Statutes at Large, 1976 (Washington: Government Printing Office, 1978), Vol. 90, Part 2, Public Law 94-583. For comments on Foreign Sovereign Immunities Act, see R. von Mehren, "The Foreign Sovereign Immunities Act 1976", Col. J. Transl. L., 17 (1978), 33; G. Khale and M.A. Vega, "Immunity and Jurisdiction: Toward a Uniform Body of Law in Action Against Foreign States", ibid., 18 (1979), 211;

- Delaume, "Public Debt and Sovereign Immunity in America", J.Mar.L., 8 (1977), 349; Delaume, "Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act 1976", AJIL, 71 (1977), 399; note "Sovereign Immunity: Limits of Judicial Control, The Foreign Sovereign Immunities Act 1976", HILJ, 18 (1977), 249; Mark B. Feldman, "The United States Foreign Sovereign Immunity of 1976 in Perspective: A Founder's View", ICLQ, 35 (1986), 302-19.
85. See U.S. Code Cong. & Ad. News 6604, 6605; USC, XXVIII (1976), Sec. 1602. Congress had additional goals in passing FSIA. See von Mehren, Col.J.Transnat'l.Law, op. cit., 33, 45; Va.J.Int.L., XIII (1980), 837-9. See also Jackson v. People's Republic of China, F.2nd, 794, 1490.
 86. F. Supp., 441 (1976), 827.
 87. F. Supp., 343 (1978), 849.
 88. CIU, 78, (17 Aug., 1978), 2451 (SDNY).
 89. S.1604 states: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in Sections 1605-1607 of this chapter".
 90. See United Mexican States v. Ashley, S.W.2nd, Vol. 556, pp.784, 786.
 91. The Matter of Rio Grande Transport Inc., F. Supp. 516 (1981). 1155 (SDNY).
 92. F.2nd, 230 (1984), 195 (5th Circuit).
 93. This case and the following cases were analyzed in P.D. Trooboff, "Foreign State Immunity: Emerging Consensus on Principles", RDC, 200 (1986-V), 339. For an extensive analysis and criticism of Vencedora's case, see note: "Exploring the Nexus Test for Asserting Jurisdiction Under the Foreign Sovereign Immunity Act", NCJIL, 10 (1985), 263.
 94. Trooboff, op. cit., p.297.
 95. F.2nd, 621 (1980) 1371 (5th Circuit).
 96. Ibid., 758 (1985) 341 (8th Circuit).
 97. Ibid., 736 (1984) 1326 (9th Circuit).
 98. See Mark B. Feldman, op. cit., p.309.
 99. F.2nd,, 649 (1981), 1354 (9th Circuit).
 100. F. Supp. 454 (1981), 576.

101. Ibid., 530 (1981), 351 (S.D.N.Y).
102. Ibid., Vol. 543, p.561; ILM, 21 (1982), 318.
103. F. Supp. 543, at 576.
104. See the series of cases cited and analyzed in Trooboff, op. cit., pp.281-97.
105. See Mark B. Feldman, op. cit., p.311.
106. Ibid., p.311; footnotes are omitted.
107. F.2nd, 592 (1977), 673.
108. F.2nd, 862, (1982), 1022 (D.C. Circuit).
109. Ibid., 1034.
110. Ibid., 647 (1981), 300 (2nd Circuit).
111. For further discussion on this due process point, see Trooboff, op. cit., pp.335-7.
112. ILM, 24 (1985), 1050.
113. See Feldman, op.cit., p.317.
114. See Trooboff, op. cit., pp.350-1.
115. S.1605(a)(5).
116. Ibid., p.352, for the discussion of the hearings on the Act and several cases decided under this section.
117. See Olsen & Sheldon v. Government of Mexico, F.2nd, 729 (1984), 641.
118. F. Supp., 488 (1980), 665. See on this point the interesting articles by H.D. Collums, "The Letelier Case: Foreign Sovereign Liability for Acts of Political Assassination", Va.J.Int.L., 21 (1981), 251.
119. See Yessenin Volpin v. Novosti Press Agency (1978), *supra*.
120. See Upton et al. v. Empire of Iran, F. Supp., 549 (1979), 264.
121. See Carey v. National Oil Corporation, ibid., 453 (1979), 1097.
122. S.1605(a)(4).
123. S.1605(a)(1).

124. See Bill No. 1071, introduced on 3rd May 1985. For the text of the Bill, see AJIL, 79 (1985), 784 et seq.; on the hearings of the proposed amendments, see Trooboff, op. cit., pp.390-3.
125. Libyan American Oil Co. v. Libya, ILM, 20 (1981), 161.
126. Maritime International Nominees Establishment v. The Republic of Guinea, F.2nd, 693 (1983), 1094.
127. S.1610.
128. Birch Shipping Corporation v. Embassy of Tanzania (1980), F. Supp., 507 (1981), 311.
129. Ibid., 313.
130. Supra.
131. See Sections 1-4 of S.1071, USC, 28, para. 606; AJIL, op. cit., p.784.
132. Per Judge Ward in the District Court for the Southern District of New York in Gibbons v. Udara's case, supra, p.1105.
133. See statement of Judge Higginbotham in Vencedora's case, supra, 1479.
134. See statement of Judge Schwarzer of the District Court of Columbia in Meadows et al. v. Dominican Republic, F. Supp., 628 (1986), 599. This and the above quotations are also cited by Trooboff, op. cit., p.248.
135. See Feldman, op. cit., p.319.
136. Note, "Foreign Sovereign Immunity and Commercial Activity: A Conflict Approach", Col.L.Rev., 83 (1983), 1440, at 1443.
137. Sinclair, op. cit., p.161.
138. Following the controversial decision in Krajina v. Tass Agency [1949] 2 ALL E.R., 274, the British Government set up an inter-departmental committee, but the committee was unable to agree on the best course to follow and the matter was dropped. See I. Sinclair, ICLQ, 22 (1973), 254, and F.A. Mann, MLR, 18 (1955), 184.
139. For the text, see UK, The Public General Act, 1978 (London: HMSO), Part I, Ch. 33, p.715. For comments on the Act see, F.A. Mann, "The State Immunity Act 1978", BYBIL, 50 (1979), 43; D.W. Bowett, "The State Immunity Act 1978", Cam.L.J., 37 (1978), 193-6; Delaume, "The State Immunity Act of the U.K.", AJIL, 73 (1979), 185; Sir Ian Sinclair, "The Law of Sovereign Immunity: Recent Developments", RDC, 167 (1980-1), 257-65; Robin C.A. White, "The State Immunity Act 1978", MLR, 42 (1979), 72-9.

140. White, op. cit., p.73.
141. For such improvement, see Delaume, op. cit., p.187.
142. The section in effect reverses Kahan v. Government of Pakistan, [1951] 2 K.B., 1003.
143. Bowett, op. cit., pp.193-194, comparing the provision with its counterpart in the US Act.
144. [1976] 2 W.L.R., 214.
145. Cf. Trendtex Trading Corporation v. Central Bank of Nigeria, [1977] 2 W.L.R., 356. The new approach seems to coincide with the approach adopted in this case.
146. S.1603(d).
147. J. Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions", BYBIL, 54 (1983), 91.
148. See Sir Ian Sinclair, RDC, op. cit., 257.
149. [1984] 2 ALL E.R., 6.
150. [1983] 3 W.L.R., 906, 911.
151. H. Fox, "Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity", ICLQ, 34 (1985), 115, at p.121.
152. See, for example, I. Sinclair, op. cit., 218-20.
153. See Sucharitkul's Seventh Report, YBILC (1985), Vol. II, Part One, 23-47, and the discussion of the Report by the ILC in ibid., I, pp.250-283. The problem of immunity from execution gives rise to different legal propositions (a) because there is no possibility of enforcing judgement against a foreign state, there should be no possibility of exercising jurisdiction against a foreign state; b) immunity from execution should be rejected once jurisdiction is exercised on the merits.
154. S.16(1) of the Act contains a saving clause whereby nothing in the Act is to affect any immunity conferred by the Diplomatic Privileges Act 1964 which gives effect in English domestic law to the Vienna Convention on Diplomatic Relations 1961, text in UNTS, Vol. 500, p.95. See also the statement of Lord Elwyn-Jones in the House of Lords in H.L.Deb., 389 (16 March 1978), 5s, cols. 1525-6.
155. See Sucharitkul's Seventh Report, YBILC (1985), Vol. II, Part One, 23-4, para. 4.
156. H. Fox, op. cit., p.129.
157. Sucharitkul's Seventh Report, op. cit., p.26, para.17.

158. Entry into force 15 July 1982, Canada Gazette, Part III, 6 (1982) 2949. In the USA the liability of foreign governments to pay US income tax is regulated by a separate enactment, namely: Income of Foreign Governments, Federal Register, 43 (1978), August, 36111-4.
159. The Foreign Sovereign Immunity Act 1981 came into force on 6th October 1981, text in Materials on Jurisdictional Immunities of States, op. cit., pp.34-40.
160. Foreign State Immunities Act, 1985, ILM, 25 (1986), 715.
161. Text in U.N. Materials, op. cit., pp.28-34.
162. No. VI of 1981; text in The Gazette of Pakistan (Islamabad, 11 March 1981); U.N. Materials, op. cit., pp.20-7.
163. See Sinclair, op. cit., pp.134-5.
164. Institute de Droit International, Annuaire, XI (1889-92), 408-38.
165. "The Second Report of the Committee", partially reproduced in AJIL, 22 (1928), Spec. Supp., 117 et seq.
166. See S. Rosenne, League of Nations Committee of Experts for the Progressive Codification of International Law (New York: Oceana Publications, 1972) Vol. 12, p.417; see also AJIL, 22 (1928), 118 et seq; "Resolution of the Fifth Assembly, the council's Rome meeting", see Rosenne, op. cit., p.xxxiv; the experts were M. Hammarskjold (Chairman, Swedish); Diena (Vice-Chairman, Italian); Gustavo (Salvadorian); Barbosa de Magalhaes (Portuguese); Mastny (Czechoslovakian); Mastuda (Japanese); Rundstien (Polish); Schucking (German); De Vischer (Belgian); Wang Chung Hui (Chinese) and Wickersham (USA). It is of interest to mention that the council was unable to appoint a Muslim jurist in time. A Bengali jurist was later nominated but he refused to accept office. However, after the Committee's first session, Sir Mohamad Rafique, a former judge of the High Court of the United Provinces, India, was nominated. See 3rd Session of the Council, LNOJ, 6th Year (1925), 120, 143, 149 and 274.
167. Rosenne, op. cit., Vol. 2, pp.420-456.
168. See Draft Article 11, with background information and commentary, Reporter P.C. Jessup, AJIL, 26 (1932), Supp. 455-747.
169. Ibid., p.597.
170. Asian African Legal Consultative Committee, First Session New Delhi, 1957, issued by The Secretariat of the Committee at New Delhi, India, undated.

171. Asian African Legal Consultative Committee, 2nd Session, Cairo, 1 to 13 October 1958.
172. See the Final Report, ibid., pp.29-31.
173. The Indonesian delegate, however, adhered to the view that immunity should continue to be granted to all the activities of the foreign state regardless of the nature of the activities. See, Asian African Legal Consultative Committee, Third Session, Colombo, 20 January to 4 February 1960, issued by The Secretariat of the Committee, New Delhi, undated, p.58.
174. For the text of the Convention, the Additional Protocol and Explanatory Reports see European Treaty Series, No. 74 (1972); GBPP, 1973, Cmd. 5081. Among the signatories to the Convention were Austria, Belgium, the F.R.G., Luxembourg, Netherlands, Switzerland and the U.K. The Convention came into force in 1976 only for Austria, Belgium and Cyprus. For a brief account of the Convention, see Sir Ian Sinclair, "The European Convention on State Immunity", ICLQ, 22 (1973), 254-83.
175. See, e.g., Hellfeld v. den Fiskus case, AJIL, 5 (1911), 490; Recueil officiel des arrest du Tribunal federal Suisse (1930), A-D. (1929-30), Case No. 78; Brasseur et Consorts v. Republique hellenique (1933), A-D. (1931-1932), 164, Case No. 85 and Weilamannetal v. Chase Manhattan Bank (1959), ILR, 28 (1963), 165. In all these cases absolute immunity was confirmed although many of these decisions have since been subject to legislative changes.
176. See Sir Ian Sinclair, "The European Convention on State Immunity", op. cit., p.269.
177. For a different justification, see Sinclair, op. cit., p.268, who explains that: "The safeguards are such as are customarily to be found in international conventions for the reciprocal recognition and enforcement of foreign judgements".
178. Declarations were made by Belgium and Austria under Article 21(4) of the Convention. See UN Materials on Jurisdictional Immunities, op. cit., Part I, B, pp.5-6.
179. Draft approved by the inter-American Committee, Rio de Janeiro, on 21 January 1983 (OEA/Ser.6-CP/doc. 1352/83 of 30 March 1983; see also ILM, 22 (1983), 292.
180. International Law Association, Report of the Forty-Fifth Conference (1952), p.vi et seq.
181. ILA, 59th Report, (Belgrade, 1980), pp.208-18.
182. Annuaire de l'Institut, 1952, 44 (Basel, 1952, No. 1, 36 et seq.

183. Ibid., 45, No. 2, 293-4.
184. See American Bar Association (Chicago, iii), 44 (1958), 521-3.
185. The Preliminary Report, Doc. A/CN.4/1323, YBILC (1979), Vol. II, 227-44; The Second Report, Doc. A/CN.4/331 and Add. 1, ibid. (1980), II, Part One, 199-230; The Third Report, Doc. A/CN.4/340 and Add. 1, ibid. (1981), II, Part One, 125-50; The Fourth Report, Doc. A/CN.4/357, ibid. (1982), II, Part One, 199-229; The Fifth Report, Doc. A/CN.4/363 and Add. 1, ibid. (1983), II, Part One, 25-52; The Sixth Report, Doc. A/CN.4/376 and Add. 1 and 2, ibid. (1984), II, Part One, 5-58; The Seventh Report, Doc. A/CN.4/388, ibid. (1985), II, Part One, p.21; The Eighth Report, Doc. A/CN.4/396, ibid. (1986), II, Part One, 35).
186. For a similar view see, for example, the statement of Mr S. Sucharitkul in YBILC (1984), Vol. I, 112, para. 7.
187. The juristic methodology of the Commission concerning ascertainment analysis and systemization of the law may be divided into two categories: the empirical and pragmatic method which involves acting or basing a draft on observation and assessment of the need, claims and attitude of states rather than in prior theory, and rather than by being rigidly governed by existing law. On the other hand, the inductive approach places greater reliance on materials illustrating state practice. For the difference between these approaches, see C.W. Jenks, The Prospects of International Adjudication (London, 1964), p.660; S. Rosenne, League of Nations Committee of Experts for the Progressive Codification of International Law (1925-1928), op. cit., I, 24-5; B. Cheng, "The International Law Commission", CLP, 5 (1952), 266-7. See also U.N. Office of Public Information, The International Law Commission (Geneva, 1972), p.241.
188. YBILC, (1981), Vol. I, 115, para. 41.
189. Mr Razafindralambo, ibid., (1984), Vol. I, 133, para. 140.
190. See Mr Evensen's statement in ibid., (1984), Vol. I, 50, para. 1 and Mr Callero Rodrigues, ibid., para. 23.
191. Ibid., (1982), Vol. II, Part One, 202, Doc. A/CN.4/357, para. 10(d).
192. These may be summarized as follows: a) ascertaining the existence of a purported rule of law; b) ascertaining the existing law; c) enhancing the chances of acceptance. For a discussion on the usefulness of the inductive approach, see Stone, J., "On the Vocation of the International Law Commission", Col.L.Rev., 57 (1957), 28-31.
193. YBILC, (1983), Vol. II, Part One, 25, Doc. A/CN.4/363 and Add. 1, para. 17.

194. See Mr Sucharitkul's sixth report, YBILC, (1984), Vol. II, Part One, 5, Doc. A/CN.4/376 and Add. 1 and 2, para. 20.
195. See the statement of Iraq's representative to the Sixth Committee, GAOR, 38th session, 6th committee, 37th meeting, para. 23. While this suggestion was made prior to the adoption of the set of draft articles in their first reading by the Commission, nevertheless the draft articles were not significantly altered in respect of the point which this suggestion raised.
196. See Sixth Report, op. cit., paras. 20-1.
197. See GAOR, 41st session, 6th committee, 30th meeting, paras. 1-9.
198. Cf. G. Fitzmaurice, "Some Problems regarding the Formal Sources of International Law", in Symbolae Verzijil (1958), 153-176; H.W.F., Thirlway, International Customary Law and Codification (The Hague, 1972), Chap. 3.
199. See the statement of Sir Francis Vallat, YBILC (1979), Vol. I, 1575th meeting, para. 18, who observed that: "The task is specially hard, because in practice cases relating to state jurisdictional immunity of states always [begin] from a private claim which in some way involved a foreign sovereign".
200. According to ILC Statute Articles 15 and 24, the Commission's main functions are the progressive development and codification of international law, i.e. the drafting of new rules of international law and the recasting of existing customary law into the written form.
201. See Mr Quentin-Baxter, YBILC (1979), Vol. I, 1575th meeting, para. 24.
202. See Sir I. Sinclair, YBILC 1 (1984), 119, paras. 20-1.
203. See, e.g., the statement of Mr Lacleta, ibid., 139, para. 24.
204. See ORGA, 38th Session, 6th Committee, 36-50th, 54th and 70th meetings. See also the statement introducing the report and the concluding observations by the Chairman of the Commission, ibid., 34th meeting, paras. 12-20, and 54th meeting, para. 52.
205. See the Sixth Report, op. cit., 11, paras. 21-2.
206. For example, draft Article 12 on "commercial contracts" and draft Article 19 on "ships employed for commercial service".
207. See J. Crawford, AYBIL, op. cit., 76.
208. Trooboff, op. cit., p.406.
209. Ibid., p.407.

210. Ibid., p.413.
211. The doctrine of absolute immunity is firmly adhered to by modern socialist writers on international law who are influenced to a measurable extent by the view held by their respective countries that the state is one indivisible phenomenon which cannot be divided into private and public persons. In their view, whatever a state does is a public act performed by the government in its public capacity. Among such writers, see Mr Nicolai I. Ushakov's memorandum presented to the ILC at its 35th session, YBILC, (1983), Vol. II, Part One, 53-6, Doc. A/CN.4/371; Lasok, "Polish Private International Law", Studies in Polish Law (Law in Eastern Europe), No. 6 (1962), 121; Enderlien, "The Immunity of State Property from Foreign Jurisdiction and Execution, Doctrine and Practice of GDR", NYBIL, 10 (1979), 111-24; M. Boguslavsky, "Foreign State Immunity, Soviet Doctrine and Practice", ibid., 167-78; Osakwe, "A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice", Va.J.Int.L., 23 (1983), 13; People's Republic of China, Aide Memoire of the Ministry of Foreign Affairs, ILM, 22 (1983), 81; Sgro, "China's Stance on Sovereign Immunity: A Critical Perspective of *Jakson v. People's Republic of China*", Col.J.Transnat'l Law., 22 (1983), 101.
212. Bluntischli, Le Droit International Codife Boarchard trans. (New York, 1815).
213. R. Phillimore, Commentaries upon International Law (London, 1854-57), vol. III, Secs. 104-9.
214. J.Y Brinton, "Suits against Foreign States", AJIL, XXV (1931), 50.
215. J. Garner, "Immunities of State-owned Ships employed in Commerce", BYBIL, VI (1925), 128.
216. J.G. Hervey, "The Immunities of Foreign States when engaged in Commercial Enterprises: a Proposed Solution", Mich.L.R., 27 (1928-1929), 751.
217. W. Bishop, a note in AJIL, 47 (1953), 93-105.
218. W. Friedman, "The Growth of State Control over Individuals and its Effect upon the Rules of State Responsibility", BYBIL, 19 (1938), 118, 123-30.
219. J.E.S. Fawcett, "Legal Aspects of State Trading", ibid., 25 (1948), 34-38.
220. E. Loewenfeld, "Some Legal Aspects of Immunity of State Property", Trans.Gro. Soc., 34 (1949), 111-26.
221. P.B. Carter, "Sovereign Immunity: Substantiation of Claim", ICLQ, 4 (1955), 469.

222. H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", BYBIL, 28 (1951), p.220, esp. at 220-4.
223. Sir I. Sinclair, "The Law of Sovereign Immunities: Recent Developments", RDC, 167 (1980-1), 117.
224. See, e.g., Friedman, op. cit., BYBIL, 19 (1938), 118, at 126, para. 2.
225. Among such writers is Loewenfeld; see "The Doctrine of Sovereign Immunity", 44th Report of the ILA 1950, 204-17, at 212.
226. See Sucharitkul, State Immunities, op. cit., p.270.
227. See statement by Sir Francis Vallat, YBILC, (1979), Vol. I, 1575th meeting, para. 19.
228. See, e.g., Sinclair, Ian, RDC, op. cit., pp.210-13; M. Sornarajah, "Problems in Applying the Restrictive Theory of Immunity", ICLQ, 31 (1982), 661-85.
229. See R. Higgins, "Certain Unresolved Aspects of the Law of State Immunity", NILR., 29 (1982), 268.
230. Restatement (Revised Statement) of Foreign Relations Law of the United States, Tentative Draft No. 7 (10 April 1986).
231. J.R. Crawford, "A Foreign State Immunities Act for Australia", AYBIL, 8 (1983), p.71.
232. Ibid., p.84.
233. For a similar view, see also J. Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions", BYBIL, 54 (1983), 75, at p.94.
234. See Trooboff, RDC, op. cit., p.304.
235. See I. Brownlie, "Les aspects recents de l'immunité de juridiction d'Etats", a report submitted to the Institute of International Law in 1983.
236. Brownlie, Principles, op. cit., 331-32.
237. M. Singer, "Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Subscribe", Har.Int.L.J., 26 (1985), 1.
238. Ibid., at p.3. For a better analysis of this approach, see Trooboff, op. cit., p.305.
239. Friedman, op. cit., BYBIL, 19 (1938), 118, at 123-30.
240. Fawcett, op. cit., BYBIL, 25 (1948), 34-48.

241. Wolfman, "Sovereigns as Defendants", AJIL, 4 (1910), 373-83.
242. Fawcett, op. cit., 35.
243. Wolfman, op. cit., 374.
244. See Sir Francis Vallat, YBILC (1979), Vol. I, 1575th meeting, para. 20.
245. See Lauterpacht, op. cit., BYBIL, 28 (1951), 226-32 and the dictum of R. Phillimore J. in The Charkieh (1873) case who observed that no principle of international law has gone so far as to oblige municipal courts to grant jurisdictional immunity. L.R. 4A. & E. (1873), 99-100.
246. See Fawcett, BYBIL, op. cit., at 47.
247. Hyde, International Law, II, (19) 849.
248. Fensterwald, "Sovereign Immunity and Soviet State Trading", Har.L.Rev., 63 (1949-50), 599-621.
249. See Mr Shwebel, YBILC, (1979), Vol. I, 215, para. 2.
250. See Sucharitkul, State Immunities, op. cit., p.333.
251. Lauterpacht, op. cit., BYBIL, 28 (1951), 220-72, especially "iii. Jurisdictional Immunities and the Rule of Law", 232-6, and "iv. Assimilation of Jurisdictional Immunities of Foreign States to those of the Domestic State", 236-41.
252. Ibid., p.239.
253. See Sucharitkul, State Immunities, op. cit., pp.278-84.
254. See Lauterpacht in 45th Report of the ILA (1952), at 227.
255. Gamal M. Badr, State Immunity (The Hague, 1984), p.100.
256. It has even been said that "given the present structure of the international community, reciprocity is at the origin of all international law", see Virally, RDC, 122 (1967-III), 51. For example, in the Preamble, the contracting parties to GATT agreed to enter into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment. These two basic principles were further specified in Art. I and Art. XXVIII of the agreement. See UNTS, Vol. 55, 187.
257. See I. Sinclair, RDC, op. cit. (1980-I), 207.
258. Lauterpacht, op. cit., BYBIL, op. cit., at 246.

259. For the part which the notion of reciprocity may play in the legal development of the law, see Mr Sucharitkul, YBILC, (1984), Vol. I, 111, para. 3.
260. See statement by Mr Riphagen, YBILC (1979), Vol. I, 1574th meeting, para. 26.
261. See United States Diplomatic and Consular Staff in Tehran, Judgement: ICJ Reports, p.3 on this point. See further, Sucharitkul's Second Report, op. cit., p.227, para. 114.
262. See PCIJ, Series A, No. 9, 1927, p.1.
263. Ibid., p.19.
264. Ibid., pp.18-19.
265. UNTS, Vol. 516, p.205.
266. For a similar but slightly different view, see Riphagen, YBILC (1982), Vol. I, 63, para. 29.
267. See Mr Uskaov's statement, YBILC (1979), Vol. I, 201, para. 22.
268. 2 RIAA, 829.
269. North Atlantic Coast Fisheries case (GB/US), ibid., 180.
270. ICJ Reports 1949, p.1.
271. See G. Schwarzenberger, International Law, 1, (London: Stevens & Sons Ltd., 1957), p.184.
272. See Trooboff, op. cit., p.217.
273. See YBILC (1950), Vol. II, 26, para. 11. However, it should be observed that a decision was adopted by the Commission not to include this paragraph in the ILC Report on the work of its second session on the grounds that it is precise in nature and rigid in form, ibid., Vol. 1, p.275.
274. See Green, L.C., "The Raw Materials of International Law", ICLQ, 29 (1980), 187.
275. See M., Akhurst, "Custom as a Source of International Law", BYBIL, 47 (1974-5), 11.
276. For example, the ICJ in the Nuclear Test case (Australia/France) observed that a unilateral declaration would be relevant "if given publicly", ICJ Reports 1977, p.267, para. 43.
277. YBILC, (1950), Vol. II, 368.

278. Mark E. Villiger, Customary International Law and Treaties (Hague: Martinus Nijhoff Publishers, 1985), p.5. Cf. Crawford, who adopts a contrary view, stating that "it would be odd if argument [before an international tribunal], which is subordinate to a decision, could somehow rise above the latter in its formal status as a law-creating agency". See BYBIL, 51 (1980), 291.
279. See for example, Judge Read's dissenting opinion in the Fisheries case (UK v. Norway), when he stated that, "the only convincing evidence of state practice is to be found in seizure, where the coastal state asserts its sovereignty over the water in question by arresting a foreign ship"; see ICJ Reports 1951, at p.191. A similar view was taken by Thirlway, who argued that: "the occasion of an act of state practice contributing to the formation of custom must always be some specific dispute or potential dispute, mere assertion of legal rights is not an act of state practice"; see Thirlway, International Customary Law (The Hague, 1972), pp.57-8; See also J.G. Laylin, "Emerging Customary Law of the Sea", Int.L., 10 (1976), 670.
280. See Akhurst, op. cit., p.5, who argued that, by accepting statement as practice, states need not break the law to change it. Another writer convincingly argued that even so-called factual practice contains in many cases instances of written or oral statement. See generally Villiger, op. cit., pp.5-8.
281. These are the most important reasons advanced by Villiger for the soundness of a wider notion of state practice. See ibid.
282. See ICJ Reports, 1969, at p.131.
283. Ibid., at p.34, para. 74.
284. Cf. Ian Brownlie, General Principles, op. cit., p.7.
285. For the reasons, see Chapter One above.
286. See for example, W. Friedman, "General Course in Public International Law", RDC, 127 (1969) -II, esp. Chap. VIII on Sources of Law, at p.135; R.Y. Jennings, "General Course of International Law", RDC, 121 (1967) - II, esp. Chap. I on Sources of Law, p.336; with many further judicial decisions and writers.
287. See Villiger, op. cit., p.19.
288. For example, the ICJ, in the Western Sahara advisory opinion, held that "in view of Spain's persistent objections to the question formulated in Resolution 3292 (XXIX), the fact that it abstained and did not vote against the resolution cannot be interpreted as implying its consent". See ICJ Reports 1975, p.23.

289. See, e.g., Mr Ni's statement in YBILC (1984), Vol. I, 122-3, paras. 4-7; Mr Balanda, ibid., 125, paras. 23-4; Razafindralambo, ibid., 35, para. 37.
290. See, e.g., the series of treaties concluded by USSR with socialist countries, including its treaty with Bulgaria, UNTS, 217, 97; China, ibid., 313, 135. Czechoslovakia, ibid., 217, 35; GDR, ibid., 292, 75; Republic of Korea, ibid., 399, 3; Romania, ibid., 226, 79. A number of treaties were also concluded to the same effect with some developed countries. See, e.g., its treaty with Austria, ibid., 240, 289; Denmark, ibid., 8, 201; Finland, ibid., 217, 3; France, ibid., 221, 79; FRG, ibid., 346, 71; Italy, ibid., 217, 181; Japan, ibid., 325, 35; and Switzerland, ibid., 217, 87. Typical treaties with rather similar provisions were also concluded by the USSR with a number of developing countries. See, e.g., its treaty with Egypt, ibid., 687, 221; Ghana, ibid., 655, 171; India, ibid., 240, 143; Singapore, ibid., 631, 125; Iraq, ibid., 328, 118; Togo, 730, 187; and Yemen, ibid., 672, 315. The relevant provisions of these treaties and others have been assembled by the Secretariat of the UN in Materials on Jurisdictional Immunities, op. cit. pp.134-50.
291. J.R. Crawford, "Execution of Judgments and Foreign Sovereign Immunity", AJIL, 75 (1981), 820.
292. Ibid., at 827-830.
293. See Mr Sucharitkul's Fourth Report, op. cit., 223-24, paras. 98-102.
294. Ibid., para. 98.
295. See Crawford, AJIL, op. cit., 831.
296. See UN Materials on Jurisdictional Immunities, op. cit., p.97.
297. See also, Sir I. Sinclair's statement, YBILC, (1984), Vol. I, 128, para. 46.
298. See, e.g., Mr Ni's statement, ibid., 123, paras. 6-7, that the trend is geographically limited and lacks uniformity; see also, Mr Balanda, ibid., 125, paras. 24-5, who relied also on the limited number of states who have ratified the European Convention on State Immunity 1972; some have emphasized that lack of practice should not be interpreted to mean adoption of restrictive practice, see ibid., 133, para. 37; see similarly, Mr Mahiou, ibid., 140, para. 34.
299. See Mr Sucharitkul's Fifth Report, op. cit., 30-31, para. 23.
300. Ibid., para. 25.

301. See Sir Francis Vallat, YBILC (1979), Vol. I, 1575th meeting, 18.
302. See YBILC (1950), Vol. II, 26.
303. See, e.g., the dissenting opinion of Judge Negulesco in the Jurisdiction of the European Commission of the Danube advisory opinion, PCIJ (1927), Series B, No. 14, 105.
304. For example, in the U.S. Nationals in Morocco's case, the ICJ was prepared to investigate the formation of customary law over a period of 11 years, see ibid. (1952), 200.
305. ICJ Reports (1969), in order to determine whether the rule embodied in Article 6(2) of the Continental Shelf Convention was transformed into a customary rule when the court stated that: "Although the passage of only a short period of time is not necessarily of itself a bar to the formation of a new rule of customary law within the period in question, short though it might be, state practice should have been both extensive and virtually uniform", at pp.42-3, paras. 73-4.
306. See Villiger, op. cit., p.24, and further writers, notes 222-5. The same author has also enumerated various functions for the duration of practice in the context of the formative process of customary law as a whole.
307. The Lotus case supra, p.28.
308. ICJ Reports 1950, p.276.
309. ICJ Reports 1969, p.3; see in particular, p.44, paras. 71-7.
310. Ibid., para. 77.
311. Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), (Merits), Judgment of 27 June 1986, ICJ Reports, 1986, pp.97-98.
312. Ibid., 97-98.
313. See Villiger, op. cit., p.26 and n.248.
314. See ibid. for further references and extracts, esp. n.250.
315. See, e.g., R.R. Baxter, "Treaties and Customs", RDC, 129 (1970) - I, pp.62-69.
316. See Villiger, op. cit., pp.27-8.
317. See Congressional Committee Report on Jurisdiction of U.S. Courts in Suits Against Foreign States, Sept. 1976, ILM, 15 (1976), at pp.1398-416.

318. This is essentially what is suggested by Professor Brownlie who stated that: "the proponent of a custom has to establish a general practice", Principles of Public International Law, op. cit., p.8. Akhurst said that negative proof can be inferred from incoherences of practice and will not necessarily depend on "disclaimers"; see Akhurst, op. cit., BYBIL, op. cit., p.34.
319. Restatement (Second) of Foreign Relations of the US Tentative Draft No. 7, XV (10 April 1986).
320. See Australian Law Reform Commission, Foreign State Immunity (Rep. No. 24), 1985.
321. Principles of International Law, op. cit., p.333.
322. See Trooboff, op. cit.
323. Crawford, BYBIL, op. cit., 75.
324. Ibid., 114.

PART II

EGYPTIAN AND SUDANESE PRACTICE ON STATE IMMUNITY

INTRODUCTION

The preceding survey shows that customary law has evolved out of the practice of various western countries. An effort to find a workable solution must necessarily include a comparative survey of the state practice of different legal systems for further growth and development of the law.¹ To this end, it is proposed to examine here the Egyptian and Sudanese practice.

From a theoretical point of view, a comparative method may be used in international law to achieve various purposes and in particular to accomplish the following: (a) to discover trends in general principles of international law; (b) to use the results of the comparison as a means of interpreting treaties and customary law; (c) to evaluate the comparison as evidence of general practice accepted as law; and (d) to ascertain under what conditions the results of the comparison of different legal orders can be transferred into the international order.²

Applying this method, the examination of the practice of Egypt and Sudan on state immunity, leads one to conclude that there is little convergence between these two neighbouring states, who otherwise belong to a similar culture and same socio-economic system. Furthermore, it provides a negative indication of the extent to which states have more or less preserved the freedom to regulate their own internal affairs. If in their municipal practice the majority of states accord state immunity to foreign states only in respect of sovereign acts and not private or commercial acts, the comparison of the practice of these two countries can indicate how far states can adopt different practices and attitudes, and that the granting of immunity depends essentially on municipal consideration of municipal policies and the internal administration of justice. As to the question of determination of customary law, a comparison of the municipal law of these countries, and indeed other municipal legal systems, could be useful in order to clarify what is and what is not recognized at the international level and to see the internal factors behind such attitudes.

The comparative method is equally relevant in the field of codification. For example, both before and after the Second World War, Egyptian judicial practice has significantly contributed to the development and eventual emergence of the customary law on the subject with a wealth of judicial reasoning and authorities, as evidenced by the various reports on the topic submitted by the Special Rapporteur of the ILC.³ Although it is difficult to evaluate the effect of these judicial decisions on the subject matter of codification, yet such comparison may provide valuable help to the process of codification.

An examination of that practice should also provide us with a critical understanding of the Egyptian decisions on the subject. National judicial decisions as Professor Crawford points out are 'subsidiary' to, rather than an aspect of state practice (which would, on this view, be restricted to treaties and custom).⁴ He goes on to say that this view regarding the subsidiary role of judicial decisions cannot apply in the field of sovereign immunity because the doctrine itself is "about the operation of domestic courts in matters involving foreign states".⁵ In short, the decisions of the domestic courts are the very data from which the international legal principle concerning the rules of state immunities have been derived.

Likewise, one cannot afford to ignore the role which that comparison may play in the interpretation of the convention which may result from the process of codification. If even only a few of the judicial decisions of Egyptian courts in this field (and none of Sudan) have been made available to international lawyers through readily accessible documentation, the valuable help which the comparison may render to the development of the law may not be fully appreciated without reference to sources other than judicial decisions, sources which are so necessary and yet which remain neglected. The political and economic development taking place in both Egypt and the Sudan might well have an impact on their governmental practices in the law on that subject. That impact

will only be felt in the international arena when these countries adopt an attitude towards issues of state immunity pursuant to their political and economic interests, particularly when they are brought as defendants before foreign courts and tribunals. These attitudes may have their repercussions on both their international relations and the international financial community, which may seriously affect the progress of the new international economic order that both countries, like other developing nations, are supposed to benefit from. The wish of these countries to be involved in the formation of this new international economic order, which is more consistent with their interests, may lead them to adopt certain policies regarding issues of foreign relations and commerce, and hence an examination of some of these policies appears to be essential in order to judge the legal impact of these policies on issues of sovereign immunities.

It is of interest also to see how these states, both of which may be regarded as newly independent states, and each of which presumably values its independence and sovereignty very highly, respond to the emerging trend in the international law of state immunity, which primarily proceeds from the point of territorial sovereignty of the local state, and to see also whether that response corresponds to their needs and interests.

It is primarily for these considerations that the examination of the practice of certain individual countries provides an instrument that can be employed to promote the growth and development of the law of state immunity. Furthermore, lessons of some significance may also be drawn from the comparison of customary rules of international law on state immunities and specific legal systems. The Islamic legal system offers a unique example of a legal system in which such comparative techniques could be employed, a comparison which will show that the doctrine of sovereign immunity has been jointly worked out by different legal systems in the process of the evolution of that law. Comparison will not merely be used to contrast the two legal systems' perceptions of sovereign immunity but also to show how other social environments used or

adopted similar legal concepts and to assess the extent to which such adaptation may serve that social environment. Although such a comparison may reveal a case of parallelism between the Islamic legal system and the rules of international law, at the same time an examination of the norms of Islamic law will show that the Islamic legal system has reached the same conclusion regarding the concept of sovereign immunity but by employing a different process and reasoning in shaping that concept. In this way such a comparison will not only concentrate on purely legal phenomena, but also on the social bond and environment within which such phenomena are developed, and thus advance not only the recognition of the fundamental characteristics of the concept of sovereign immunity, but at the same time allow insight into the origin of that concept as developed by different legal systems. The revival of Islam in the world today, the movements of Islamization of law in different parts of the Muslim world and trade between the West and that part of the world, add the element of expediency to other motives for the study of Islamic law and institutions, which great barriers have so far discouraged any general interest therein. Such a comparative method may provide means and ways of bridging the wide gap between the attitudes of different international lawyers who belong to the various legal systems of the world, and thus make international law itself better understood.

It is intended in this part to first try to explain and clarify the circumstances under which these decisions were rendered in both Egypt and Sudan. Later, practice other than judicial will be examined in relation to each country in order to relate those practices to the development of the law generally.

References - Introduction, Part II

1. See Sucharitkul, State Immunities, op. cit., p.335.
2. See "Comparative Method and Public International Law", in W.E. Butler (ed)., International Law in Comparative Perspective (The Hague, 1980), p.49.
3. See the Special Rapporteur, Fourth Report, Doc./A/CN.4/357, paras. 60-1; Sixth Report, Doc. A/CN.4/376, para. 173.
4. See J.R. Crawford, "A Foreign State Immunities Act for Australia?", AYBIL, 8 (1983), 71, at p.77.
5. Ibid., p.77.

CHAPTER THREE

IMMUNITY OF FOREIGN STATES IN EGYPTIAN LAW

A. JUDICIAL PRACTICE (1): THE JURISPRUDENCE OF THE MIXED COURTS

I. THE ORIGIN OF THE COURTS

From 1517 to 1914 Egypt was a constituent part of the Ottoman Empire, in no way differing from other provinces under Turkish rule. Islamic law, as administered by the Qadi, was the prevailing system.¹ Into this society at the turn of the century burst a flood of new and disturbing influences. Mohammed Ali, Governor of Egypt, had achieved some degree of autonomy when he concluded with the Ottoman Empire an agreement authorising him to make treaties with foreign powers provided that he did not thereby injure the political interests of the Ottoman Empire. By the London convention of 15 July 1840,² Mohammad Ali was confined only to the Egyptian sphere of influence and the convention required him to conform to that arrangement. He was also allowed a measure of financial freedom within the domain of his administration. Following these international arrangements, Mohammad Ali was granted a firman,³ dated 13 February 1841,⁴ conferring upon him the government of Egypt with a hereditary tenure under certain conditions. By the same firman he was also granted the right to govern the provinces of Nubia, Darfour, Kordofan and Sennar for life. The firman of 1 June 1841,⁵ which established the basic pattern of the formal Ottoman-Egyptian relationship until 1914, provided that the Ottoman laws and all treaties concluded between the Sublime Porte and the foreign powers, shall be fully applied in Egypt.⁶

Although it was often said that Egypt continued to be under Ottoman sovereignty, that sovereignty was steadily becoming nominal

only and the actual conduct of affairs remained under the Khedive's hand. This nominal sovereignty, however, did have a significant effect on the legal history of the country. The provision of the firman of June 1841, referred to above, had led to the extension to Egypt of treaties, known as capitulations, between the Sublime Porte and Christian powers. It also led the Egyptian rulers, in their negotiations with foreign states, to keep within the limits prescribed by the Sultan in Constantinople. It was in this way that Egypt had come within the scope of the capitulations, through which foreigners had acquired extensive immunity from Egyptian jurisdiction and enjoyed positive extra-territorial rights. For example, the Treaty of 1830 between the USA and Turkey,⁷ which by the most-favoured-nation clause (MFN) was applicable to all the capitulatory powers, provides that:

Citizens of the United States of America, quietly pursuing their commerce, and not being charged or convicted of any crime or offence, shall not be molested; and even when they may have committed some offence, they shall not be arrested and put in prison by the local authorities, but they shall be tried by their Minister or Consul, and punished according to their offence, following in this respect the usage observed towards other Franks.

While Turkey was unable to fully execute this provision, in Egypt it was obeyed to the letter.⁸

Originally capitulation referred to a class of commercial treaties which Western powers had concluded with the Ottoman Empire since 1535.⁹ It is beyond the scope of this work to enter into any detailed examination of the capitulatory regimes in Turkey,¹⁰ but generally they provided for the following privileges and immunities: freedom of residence, trade, religion, arbitrary taxes, attendance by the consul of the accused or his representative in the Ottoman criminal courts, and obtaining the consent of the consul before searching a foreign domicile. All these privileges were enjoyed by foreigners in Egypt, together with the extensive consular jurisdictions over civil cases where their nationals were defendants.¹¹

The extension of the application of these privileges and immunities had been allowed to develop gradually as custom, adopted as usage, and had led to complete judicial "chaos and babel".¹² It is important to emphasize that Egypt had not escaped the general Westernization movement enunciated in the Ottoman Empire by virtue of the Tanzimat (reforms) of 1839.¹³ Reforms in the law were considered vital for both Turkey and Egypt so that they could show that their countries provided a safe place and a secure environment for foreigners and foreign capital.¹⁴ It was on to the stage thus set, that there stepped on 18 January 1863, Isma'il, grandson of Mohammad Ali. Isma'il's avowed purpose was to modernise Egypt and he realized that, in order to carry out his modernisation schemes, he had to establish a stable and just legal system to which both Egyptians and foreigners could resort. On 27 May 1866 he succeeded in obtaining from the Sultan a firman, enabling him to govern Egypt on the basis of male primogeniture rather than male seniority in the family, as had been allowed by the firman of 1841. Although he governed under the sovereignty of the Sultan, for all practical purposes he actually governed under the rules of Egypt.¹⁵

However, some European powers did not consider that Isma'il had any capacity to conclude with them treaties concerning judicial reform. To overcome this obstacle, he succeeded in securing another firman of 8 June 1873,¹⁶ giving him almost unrestricted legislative autonomy and full control over non-political external affairs such as commerce, customs and other external matters. In his reign, capitulations were a scandal, with the consular staff of most of the 14 countries enjoying privileges and considering it their appointed task to protect their own nationals, with the result that it became almost impossible to secure a conviction against a foreigner in either civil or criminal cases. The inability of the consuls to track down offenders or enforce their decrees, the endless delays in proceedings in their courts and appeals, the diversity of their law and procedure,¹⁷ and the impossibility of securing convictions for offences against public revenue and morality, afforded many hardened criminals complete immunity from punishment.¹⁸

Originally designed to protect foreign interests, the capitulations had developed into extra-territorial privileges that protected racketeers of all kinds - smugglers, forgers, gamblers and even murderers.¹⁹ Premises occupied by foreigners could not be entered by Egyptian authorities and became the sanctuary of criminals pursuing their illegal trade, even also affording refuge to Egyptian criminals.²⁰

Since most commerce was in the hands of foreigners, and quasi-foreigners (i.e. nationals taken under foreign protection by a gross abuse of power),²¹ most commercial disputes involving foreigners and their consuls were decided by consular courts. These courts were found to be ineffective in most cases and the judges were without legal qualifications. When a foreigner had a dispute with the Egyptian Government, and this was quite common because most of the modernisation schemes were carried out by foreigners, essentially no Egyptian tribunal would pass a judgement against the Egyptian Government or Khedive. Thus the consuls intervened and took up the claims of their respective nationals, however absurd or dishonest, and submitted them to the Egyptian Government. This explains why Egypt had paid out indemnities for many worthless projects and was unable to have claims tested on their merits.²² In this way the Khedive was defendant to numerous lawsuits, having for their object the extraction of money under one pretext or another. He is reported on one occasion to have hastily closed an open window when a notorious European merchant entered his audience chamber. Upon being asked the reason for this action, he replied bitterly: "If that man catches cold it would cost me thousands to cure him".²³

In a report submitted to the Khedive Isma'il by his Armenian Foreign Minister, Nubar Pasha, it was observed that:

The jurisdiction which determines the relations between the Europeans and the government of Egypt and the inhabitants of the country, is no longer based on the capitulations. The capitulations exist only in name. They have been replaced by an arbitrary law of custom, varying with the character of each diplomatic chief - a law based upon precedents frequently abusive, which has been permitted to take root in Egypt through force of circumstances and constant pressure and desire to make easy the lot of the foreigners. It leaves the government powerless in relation to such foreigners and the people without any security that even-handed justice will be done. 24

It is quite clear that the commencement of a better order of things was brought about by circumstances apparently foreign to the question of judicial reform in the country. The many difficulties to which the capitulations gave rise became a source of anxiety to the Egyptian Government. These conditions called for some sort of reform. The Egyptian Government made representations to the various capitulatory powers, pointing out the difficulties and asking their cooperation with a view to establishing a new system. In its inception, the Egyptian Government's project had suggested a practical transfer of the consular courts to new tribunals in which foreign judges would sit side by side with national judges and administer not foreign but national law. It is impossible to trace here in detail the course of the diplomatic battle that followed. However, on 28 October 1869 an international commission was arranged in Cairo, under Nubar Pasha's presidency, Isma'il's special agent and his chief negotiator in his dispute with the Suez Canal Company and in the floating of his loans. The Commission included in its membership delegates from Austria, Germany, Great Britain, Italy, Russia, France and the USA. The work of the Commission was interrupted by the outbreak of the Franco-Prussian War. The delay in the work of the Commission gave the Turkish Sultan an opportunity to oppose the independent action taken by Egypt in this particular regard.²⁵ In order to overcome this difficulty Nubar succeeded in securing from the Sultan another firman issued in 1873, giving Egypt greater power to negotiate with foreign states.

A second international commission met at Cairo four years later to consider new proposals and schemes. The work of this commission resulted in a project and various recommendations which were put before the capitulatory powers. Eventually, at Constantinople, conventions with European powers were formulated by the Egyptian Government and these were known as the *Reglement d'Organization Judiciare* (The Charter of the Mixed Tribunals) and the Code which the courts were to apply.²⁶ The time between 1873 and 1875 was spent mostly in arranging practical matters, and the courts were officially opened in January 1876, with the first cases being heard

on 1 February 1876.²⁷ The rules dealing with the whole machinery were subsequently modified, and the courts were abrogated in 1949.²⁸

The organization of the courts comprised three district courts at Cairo, Alexandria and al-Mansourah, and a Court of Appeal sitting at Alexandria with typical appellate jurisdiction. Each of the district courts was originally composed of seven judges, three of whom were Egyptians. The number of judges of the Court of Appeal was 11, 4 Egyptians and 7 foreigners. The power to select foreign judges and the method of selection had given rise to controversial debates during the diplomatic negotiations between the Egyptian Government and the capitulatory powers.²⁹ Yet it was eventually agreed that the right to appoint foreign judges lay with the Egyptian Government after consulting their respective governments. The courts were declared independent from any interference by the Egyptian Government in the sense that no Egyptian judge should accept any mark of distinction or honour from the government.

However, it has to be emphasized that the consular courts survived the establishment of the Mixed Courts and continued to deal with civil litigations between foreigners of the same nationality and the prosecution of crimes committed by foreign subjects (other than those within the competence of the Mixed Courts).³⁰ At the time of the establishment of the Mixed Courts, other Egyptian judicial institutions existed: a) Sharia Courts; b) Mejlis or administrative Courts of the ruler; and c) personal status courts for cases involving non-Muslim religious disputes. In addition to their jurisdiction in minor offences, the Mixed Courts were established to apply a mixed code of civil law, commercial law, maritime law, and civil and criminal procedure based upon the French models.

The Mixed Courts were designed to deal not only with questions between European nationals inter se but also with disputes which might arise between them and Egyptian nationals. The jurisdiction of the courts in civil and commercial matters extended over all

suits between Egyptians and foreigners of any nationality, even although the foreigners might belong to a state which was not one of the signatories to the Treaty under which the Mixed Courts were established, and which would not have capitulatory privileges.³¹

The term 'Mixed Courts' serves to indicate the nature of the jurisdiction assumed by the courts from the very beginning. The competence of the courts as laid down in Art. 9 of the old Reglement d'Organization Judiciare,³² involved an exclusive jurisdiction in the following types of litigation:

- i- between foreigners of different nationalities;
- ii- between foreigners and Egyptians; and
- iii- regardless of nationality of litigants, cases concerning land property.

However, it should be stressed that the word 'foreigners' was not limited to subjects of those capitulatory powers who had participated in the process of establishing the courts. Following literally the letter of their charter, the Mixed Courts, from the beginning, held that the courts were open to subjects and citizens of all foreign powers. But much greater difficulties were experienced in treating as foreigners the members of the new states which were carved out of the Ottoman Empire (i.e. Palestine, Syria and Iraq).³³ On this point an interesting case was decided by the Mixed Court of Mansoura in 1911.³⁴ A certain Syrian born in Beirut was a French protegee. It was held that foreign protection should be recognized as genuinely foreign unless the status was clearly changed by a treaty.

In 1926 the Mixed Court of Appeal adopted the view that Syrians were not to be deemed foreigners for the purpose of the jurisdiction of the courts.³⁵ This decision would have been soundly accepted before the Treaty of Lausanne 1923, under which Turkey abandoned all her possessions in Egypt and Asia Minor, but was hardly acceptable under the new system. It was believed that the signature of the Treaty of Lausanne³⁶ had made the position quite clear. Thus, for the purpose of the jurisdiction of the courts, Syrians should have been treated as foreigners. The Mixed Court of al-Mansoura

rendered a judgement on 15 November 1927 in which it adopted a similar view in express disagreement to the decision of the Court of Appeal. The court held that the mere fact that Bulgarians were Ottoman subjects would not prevent their being treated as foreigners when they were no longer Turkish subjects.³⁷ It follows that there is no legal basis for distinguishing between Bulgarians and Syrians in this particular regard. Therefore, although the jurisdiction of the Mixed Courts was founded primarily on the difference of nationality between the parties, the courts had from the very beginning to go considerably beyond the letter of this limit.

A new formula was devised by the courts, with the result that the competence of the courts was not exclusively determined by the nationality of the parties, but also by the character of the interests involved. This wide interpretative stance was expressly followed in a case concerning the Suez Canal Company.³⁸ The company was established in 1866 by an agreement concluded by Egypt with the company. Art. 16 of the Convention declared the company to be Egyptian, while the internal administration of the company was left to be determined by French law. The court declared itself competent on the ground that the foreign holding of shares in the company was sufficient to justify the competence of the court, and thus there was a mixture of interests, regardless of the fact that the company was expressly declared as Egyptian by the convention.

The theory of mixed interests thus enunciated was soon followed in number of cases.³⁹ One important case in which the theory was applied in 1888 was that of Daire Sanieh,⁴⁰ in which the Mixed Courts of Appeal made it clear that their jurisdiction was determined whenever 'mixed' interest was discoverable, and not according to the nationality of those who safeguarded the interests.

This theory brought within the jurisdiction of the courts all the cases in which foreign states and their organs were involved. The competence of the Mixed Courts in cases of state immunity was primarily founded on this theory of mixed interests. However, it

should be borne in mind that the new development had greatly contributed to the confidence necessary for the investment of foreign capital, and may thus be said to have been of great benefit to Egypt. At the same time it enabled foreign capital to make the best of both worlds, since by registering in Egypt, a British or French-owned company could escape heavy taxation, while at the same time remaining exempt from the jurisdiction of the national courts.⁴¹

The operation of this doctrine of 'mixed interests' gave the Mixed Courts practically a monopoly of bankruptcy cases and commercial litigation, and other civil cases involving foreign states. This development, however, did undermine the national courts.

II. THE JURISPRUDENCE OF THE MIXED COURTS AND STATE IMMUNITY

The Mixed Courts provided interesting material on state immunity. These courts had been consistent throughout in denying immunity to foreign states with regard to their acta jure gestionis. One of the first questions to arise is why this relatively recent trend in the law of state immunities at that time had shown itself clearly and so early in the jurisprudence of the Mixed Courts.

1. The Impact of Continental Law

One answer appears to be that the organization procedure and the law applied by those courts were to a large extent continental institutions, where the restrictive trend of state immunities originated.

1) In its law and organization the courts were largely influenced by the continental concept and practice.⁴² The judges of the Mixed

Courts comprised different European nationalities,⁴³ among which the most numerous foreign judges were from continental Europe where the theory of limited immunity had firstly been adopted. On the other hand, Anglo-Saxon judges, who were familiar with the traditional doctrine of absolute immunity, were relatively few.

2) The laws applicable by the Mixed Courts were basically modelled on continental civil law. Six codes were promulgated: civil, commercial, maritime, penal, civil and criminal procedure, which the Mixed Courts were to apply in all cases that came before them. It was further provided that, in the case of silence, incapacity or obscurity of the law, the judges should conform to the principle of natural law and equity,⁴⁴ "the equity of course not of English, but of Roman law".⁴⁵ The preparation of these codes had been entrusted to foreign officials who, almost without exception, had been trained solely in the continental school of jurisprudence, and who consequently were disposed to look upon the models furnished by the code Napoleon. It was in reality according to an English observer, "a system of pure and unadulterated French law".⁴⁶ The codes were presented in French to the capitulatory powers and accepted in that language.⁴⁷

3) The organization and procedure of the Mixed Courts were unfamiliar to English, and presumably also American lawyers.⁴⁸ In the whole conduct of a case, from beginning to end, the system differed widely from that to which Anglo-Saxon lawyers were accustomed.

4) Although there were four 'judicial languages', viz. French, Italian, English and Arabic, any one of which in theory might be used in the courts, in practice French alone was employed as the medium, and in general was understood by all the judges. As an English commentator said, "For a barrister to address the courts in English would simply result in his not being understood".⁴⁹

It was probably due to these considerations that continental jurisprudence in general, and the views of continental courts on the question of sovereign immunity in particular, found a fertile soil in the Mixed Courts of Egypt while the influence of the Anglo-Saxon doctrine of the sovereign - and subsequently state immunities - found no response in the Mixed Courts.

2. The Influence of the Competence of the Courts in Cases in which the Egyptian Rulers and Government were involved

Another explanation for the restrictive trend of immunity adopted by the Mixed Courts on the question of state immunities lies in the fact that the Government, the administration, the Khedive and the members of his family were made subject to the jurisdiction of the courts.

Khedive Isma'il, in order to carry out his modernization programme in Egypt, had contracted huge debts with various creditors.⁵⁰ A very large proportion of the debt was due to the gross extravagances of the Khedive and his unprofitable transactions. His creditors had taken advantage of the fact that, as he was nominally under Turkish suzerainty, he could not contract loans on the security of Egypt's revenue. Thus his creditors forced on him unsecured loans at exorbitant rates of interest.

Again, his huge properties, the state railways, the telegraphs, the sugar works, his palaces, the state lands were all presented as security for his private debts. In this way the status of the loan was confused since the Khedive's private debts were made the liabilities of the state.⁵¹ The separation of the liabilities of the state from those which were purely personal was important since the latter would be charged to the private estates of the Khedive and the former against the revenue of the country. Furthermore, the confusion of liabilities in these cases had made the task of the courts more difficult, since the jurisdiction of the Mixed Courts over the matter of sovereignty was excluded. Art. 6

of the Mixed Civil Code⁵² provided that: "In disputes with foreigners, the Mixed Courts were competent to decide matters relating to the Government and the Khedive's land and that of his family" provided that there was no question of acts of sovereign authority being involved.⁵³

In this way cases concerning the Khedive's debts were brought before the courts. Only a few months from the opening of the Mixed Courts, these cases were decided and the Khedive was summoned before the courts as defendant in these suits,⁵⁴ and in the passage of time, case after case was decided by the courts against the Khedive. However, it must be emphasized that most of these decisions remained unenforced for a long period because of the refusal of the Egyptian Government to cooperate in enforcing them. The consequences of this act of non-cooperation on the part of the Government have been identified as two-fold:

- 1) The capitulatory powers, who accepted the tribunal system when they surrendered their privileges, viewed this refusal by the Khedive to enforce these decisions as a serious obstruction of, and a manifest reduction in, the powers of the courts.
- 2) The native Egyptians condemned their rulers for having failed to implement these decisions since that act would amount to gross defiance of the law, from which the native population wanted to see that their government was not immune.⁵⁵

In fact the Khedive remained adamantly against assisting the employees of the Mixed Courts in enforcing the judgements rendered against his government for quite a long time.

The clashes between the courts and the Government raised serious differences of opinion among the judges of the courts. Some refused to assume jurisdiction on the ground that the assets of the Government could not be made subject to measures of execution, since they were Government property. The court made it clear that

this is a general rule, for which an exception must be shown by the creditors concerned.⁵⁶ On the other hand, some of the judges were extremely reluctant to sit in courts whose decisions would be obstructed by the actions of the Government. Thus, on the Khedive's refusal to enforce a decision rendered against him, a Dutch judge openly declared that he was unwilling to sit on this trial and closed the court.⁵⁷

This explains how the Mixed Courts, who owed their existence to the Khedive Isma'il, were the instrument which dealt him a death blow when he was deposed on 30 June 1879. But the practical result of these clashes was that the Mixed Courts had tended from the beginning to act contrary to the principle that a government cannot be sued without its consent.⁵⁸

The cases involving the Egyptian Government and the Khedive were accompanied by other decisions enunciating or demonstrating general principles. The question of the competence of the courts occupied a large amount of the courts' time, and a number of guidelines were set out for deciding cases involving public sovereignty, reviewing administrative actions, and the status and capacity of government organs.⁵⁹

3. Basis of the Competence of the Mixed Courts over Foreign States

In determining its competence the courts had from the beginning gone considerably beyond the letter of its charter. The result was that the competence of the courts was not exclusively determined by the nationality of the parties, but also by the character of the interest involved. This wider interpretation brought within the jurisdiction of the courts the largest enterprises of the country, including the Suez Canal Company and the entire banking system of Egypt.

The most notable case decided by employing the theory of "mixed interests" concerned the Suez Canal Company.⁶⁰ The Mixed Court of Alexandria assumed jurisdiction on the ground that foreigners held shares in the Suez Canal Company and thus there were mixed interests, irrespective of the nationality of the company. The same theory was also elaborated in other cases in which foreign interests were discoverable.⁶¹

The "mixed interests" formula was also used to bring within the jurisdiction of the Mixed Courts cases involving Daira Sanieh. The Mixed Court of Alexandria held that its jurisdiction was based essentially on the nature of the interests involved and not on the nationality of those who held them.⁶²

Similarly, the same theory was used to subject foreign state organs to the courts' jurisdiction. The most important case on this point was one concerning the Ottoman Bank. The Bank was a financial institution managed by a board of directors whose members were residents of various European countries and Turkey. It was regulated by a concession secured from the Sublime Porte of 18 September 1878 and 5 April 1879, and the Egyptian Government held interests therein. It was asserted by the latter that the Bank was outside the sphere of the Mixed Courts. The Court refused to accept the contention and declared itself competent on the ground that the concessions which regulated the establishment of the Bank were private agreements and could not oust the jurisdiction of the court.

The plea of state immunity was directly raised and it was claimed that the Bank was in reality an agency of the Ottoman Empire exercising governmental functions on behalf of that latter. The claim was rejected by the court which observed that the function of the bank as treasurer and paymaster is a function which could be exercised by the bank to the public at large and the fact that the Ottoman Empire was one of the customers of the bank was not sufficient to remove the competence of the court over the dispute.⁶³

The next case in which the question of immunity was directly involved concerned the Caisse de la Dette.⁶⁴ The main question before the court was whether the Egyptian Government was entitled to spend the surplus money of the commission as it deemed fit. This case, which is often referred to as the Dongola Expedition case, was in essence a dispute in which the court had to rule on whether the money was spent in reconquering the Sudan after the Mahdi's revolution. The money necessary for the expedition was drawn from the commission's fund. Later a dispute arose concerning the repayment of the loan. The Egyptian Government argued that the advance of money was an act of sovereignty which could not be questioned by the Mixed Courts. The Courts, however, declined to assume jurisdiction on the ground that the advance of money for the expedition was des dépenses extraordinaires and thus constituted an act of sovereignty. The importance of this decision lies in the fact that it was the first decision of its kind in which the Mixed Courts accepted the distinction between sovereign and private acts and actually based its decision on such a ground, although the final result was to grant the immunity claimed. In this case the court seemed to be influenced to a measurable extent by the fact that the attempt to reconquer the Sudan, which was undertaken by both the British and Egyptian Governments, was essentially an act involving the assertion of sovereignty in other territories and notoriously designed to achieve that purpose. In this context, the court was prepared to view the advancement of the fund as an extraordinary purpose.

Another significant case in which the question of state immunity was directly at issue was one in which the status of the Sudan was examined by the Mixed Courts.⁶⁵ The plaintiffs brought an action for repayment from both Egyptian and Sudanese Governments for work they had done in Port Sudan, claiming that the Sudan was an integral part of Egypt and that, therefore, the Egyptian Government was responsible for its debts. The most interesting point in this case was that the Egyptian Government relied on the Anglo-Egyptian Convention of 1899 which established the condominium over the Sudan, asserting that the Sudan was established as a distinct and separate

entity from Egypt. On the other hand, the Sudan Government, relying also on the same convention, claimed that the Mixed Courts' competence was excluded over the Sudan. Both arguments were accepted by the Court which, accordingly, declared itself incompetent.

The decision of the court was in accord with the provision of the convention, since it was expressly provided in Art. VII of the Agreement⁶⁶ that the jurisdiction of the Mixed Courts shall not extend to nor be recognized in any part of the Sudan. However, the same appears not to be true as far as the argument of the Egyptian Government is concerned, since it was clearly felt by the court that the Agreement in effect had vested some sort of sovereign rights over the Sudan in the Egyptian Government. Moreover, the decision virtually runs counter to the Public Debt Commission's case, since it was clearly recognized in that case that what the Egyptian Government had done in raising funds for reconquering Sudan was an act of sovereignty. It is in regard to this particular point the decision has not provided a satisfactory answer to the question of why state immunity should be granted.

The distinction between sovereign and private acts continued to be applied by the Mixed Courts, throughout their history, to disputes in which the Egyptian Government was involved. Cases regarding the responsibility of the Egyptian Government to maintain law and order and its consequences were examined by the courts on the basis of the same distinction in order to rule over private litigants' claims against the Government.

During a riot in Alexandria in 1921 a foreign alien, standing on a balcony, was shot by a policeman. An action for loss of life was brought against the Egyptian Government before the District Court of Alexandria. The court refused to entertain the action on the ground that the act of the police was essentially an act of sovereignty of the Egyptian Government. When the case was brought before the Mixed Court of Appeal, the court ruled that there was no doubt that the police were part of the state organ for the purpose

of law and order. Nevertheless, their acts were subject to judicial review like any other administrative action. The court, however, held that the Egyptian Government had been negligent in arming an unskilled employee and therefore was vicariously liable for the act of its servant.⁶⁷ It is not clear how the court in this case based its decision on negligence. If the act of the police, as the court had observed, constituted an act of sovereignty, then it becomes very difficult to understand how the court assumed jurisdiction to rule on the merits of the case. As had already been stated by the courts on numerous occasions, the question of jurisdiction goes with immunity, and if there is immunity on the basis of a sovereign act, then it could rightly be asked how the court could entertain the suit albeit with this virtual absence of jurisdiction, which the court seemed to imply by classifying the act in question as a sovereign act.

The Summary Tribunal of Alexandria in a similar case went a step further and held that the question of sovereignty could not be invoked in cases where the police were guilty of gross negligence in their normal duties and, as a result, an individual had suffered injury.⁶⁸ This was a case in which the claimant brought an action for damage to property during a demonstration against opponents of the Government. The court held the Egyptian Government responsible for the repair of the plaintiff's car.

Apart from the contradiction with the concept of jurisdiction, these two cases were a source of serious concern to the Egyptian Government, for it was difficult to see how, under these circumstances, a government could discharge its duties to the public in maintaining law and order. Moreover, these judgements had bluntly invoked the question of the protection of innocent individuals, since in fact there was no statutory provision giving the private individual the right to claim compensation for damage occurring during a riot.⁶⁹

It may be remarked that it was on the basis of the "mixed interests" formula on the one hand, and the distinction between a sovereign and a private act on the other, that the Mixed Courts were prepared to subject foreign states and their agencies to the jurisdiction of the courts. These two concepts were so closely linked to the question of competence that the courts had never hesitated to declare themselves competent in cases in which foreign states were directly or indirectly impleaded. There was perhaps not a single case in which an individual foreign government had been treated favourably in this regard. All were made subject to the jurisdiction of the courts on the same legal basis.

The relevance of the previously discussed cases to the general treatment of state immunity may be summarized as follows:

In the first place these decisions broadened the extent to which the Egyptian Government was subject under domestic law to civil suit for their wrongful acts arising from contracts or torts. Since the establishment of the Mixed Courts, the Egyptian Government has been open to suit in the courts for breach of contract and for claims of damages and thus the immunity of the Egyptian state for tort claims has been removed with certain exceptions that are discussed when considering tort actions against the Egyptian Government. Thus, the Mixed Courts have followed a clear evolution toward greater state responsibility for injury to citizens.

In the second place these cases have restricted immunity to instances in which the Egyptian state has acted in its official capacity as a sovereign political entity. These cases had given the Mixed Courts an ample opportunity to test the application of the distinction and eventually to develop a body of case-law which provides the restrictive trend with valuable materials and legal analysis when assuming jurisdiction over foreign states.

III. THE GENERAL TREND

1. Possible Exceptions to the General Rule of State Immunity

The rule laid down by the Ottoman Bank case of 1890 concerning the competence of the Mixed Courts over foreign states began to be settled by the courts towards the 1900s. It was not surprising that under the circumstances explained above, namely the impact of continental jurisprudence on the courts' structure and composition, the Mixed Courts followed those of Belgium and Italy to decide suits against foreign states so long as the question of sovereignty was not involved. This trend of judicial opinion was reaffirmed early in 1901 when the first case involving the matter of state immunities came before the Court of Appeal in Alexandria in the case of Gelderland.⁷⁰ The "Gelderland", a Dutch cruiser, collided with an Egyptian merchant vessel in Port Said and her captain in his official capacity brought an action for recovery of damages. The court declared itself competent on the ground that the Dutch Government was submitting voluntarily to the jurisdiction "which it can indubitably do".

Having thus endorsed the restrictive doctrine of immunity, the case marked a new era in which the Mixed Courts had recognized that voluntary submission constituted a waiver of immunity, thus enabling the courts to assume jurisdiction. It seems that the court had interpreted the institution of proceedings by the captain of the Dutch Government-owned vessel as an act of voluntary submission, since the captain had decided of his own accord to bring the suit before the Mixed Courts and had thus indicated his intention to submit to the jurisdiction of the courts. The effect of this submission was clearly to disentitle the Dutch Government from pleading jurisdictional immunity in the context of the proceedings that had been initiated by its own volition.

(a) Succession

It was not until 1912 that the same court set forth the doctrine which has come to be identified with continental jurisprudence. In the Dame Marigo case,⁷¹ the court approved for the first time the distinction between the competence of national courts over the sovereign and the civil acts of foreign states. Property real and personal situated in Egypt had been left to the Greek state, and the widow of the testator instituted proceedings to break the will. The Greek state was made a respondent, and entered a plea to the jurisdiction of the court. The court refused to accept the plea and declared itself competent.

In so doing, the court held that the only bases for competence of courts as regards foreign states as defendants are sovereignty and independence, which traditionally prevented them being subjected to the jurisdiction of other states. As an exception, the principle of immunity must be strictly interpreted and should not be extended beyond the reason for its existence. Although the Greek treasury was a foreign government organ, the court decided that the same principles should be applied as if it had been a department of the Egyptian Government. Thus the court found it necessary to classify the acts of the Greek treasury. They were found to emanate from the Greek Government as a personne civile, and were therefore acts of a private character.

The importance of the decision lies in the fact that it is the first instance in which the Mixed Courts began to recognize the bases of state immunity in international law, namely, the sovereignty and independence of states. Yet sovereignty was said not to be involved since there was still no reason to extend it to litigation regarding real property or succession in the country of the forum. The influence of the continental jurisprudence on the court was noticeable in this case: the chamber of the court comprised eight judges, five of whom were foreigners. The court also employed the comparative law technique by looking to judicial decisions from outside their own jurisprudence. It referred to a

leading Belgian case on the subject in approving the distinction under discussion.⁷² However, it is of interest to recall that cases involving succession, gift or bona vacantia have been increasingly recognized not to attract immunity in various recent national legislations, conventions and draft conventions.⁷³

(b) Public ships employed for commercial purposes

It should be observed that the practice of states with regard to state immunity in general started in many countries with the recognition of the immunity of public armed ships,⁷⁴ and gradually the principle of state immunity was applied to the state itself or its organs. The Mixed Courts case-law had similarly followed this line. The Sumatra case (1920)⁷⁵ involved a British vessel belonging to His Britannic Majesty and was commanded by Captain Hall. The "Sumatra" collided with the "Mercedes", a Spanish ship, in the harbour of Alexandria. An action for damages was brought against Captain Hall who contested jurisdiction, claiming that the court could not entertain a suit against a foreign state. He produced a certificate to the effect that the vessel was owned by His Britannic Majesty despite the fact that she was engaged on a commercial voyage and was commanded by a civilian. The court rejected the claim, holding that it would be a negation of justice to grant sovereign immunity where a civil wrong had been committed by an employee of a foreign state in the management of its private interests and without any connection with its political action. Having thus retained jurisdiction, the Court of Appeal found it necessary to proceed with the case upon its merits, and this having been accomplished, a later judgement was given to the effect that no fault had been established on the part of the captain of the British ship and, therefore, no damages were awarded. The court clearly based its jurisdiction on the private character of the activities of the ship. It also rejected the criterion of ownership as a decisive factor in determining the question of immunity. Thus the fact that the ship was actually owned by the British Government was considered to be irrelevant to the issue of jurisdiction.

On this point, two judgements may be contrasted. The first, is the W. Stapledons case,⁷⁶ in which an English merchant vessel was involved which had been chartered by the British Admiralty for the transport of troops. An Egyptian subject was killed as a result of the manoeuvres of the vessel in the harbour of Port Said. In an action for damages, the court declared itself incompetent to investigate the responsibility of the British Government, or of its agent, for the alleged fault of the officer in the performance of his duty. The court held that:

It is generally admitted in international law that immunity from jurisdiction in favour of warships extends to merchant ships especially designed for the transport of troops and commanded by officers belonging to the maritime corps. 77

It is clear from this judgement that the fact that a ship is a private and not a public ship does not deprive her of immunity if it is being used for a public purpose and is manned or commanded by an officer of the Royal Navy and not merely a civilian. Therefore the criteria for immunity now comprised three separate elements: ownership on the part of the foreign state, performance of public acts and command by a regular officer.

The second case was decided by the same court on 15 January 1924.⁷⁸ The ship belonged to the Government of Hidjaz, and was ordinarily armed and used for the defence of the Red Sea ports. She was arrested in Egyptian waters for an alleged debt. At the moment of attachment, she had been disarmed and employed in the carriage of pilgrims. Her local agents raised the plea of sovereign immunity on the ground that she was a public vessel designated for coastal defence. In denying immunity, the court pointed out that the mere fact that the vessel was the property of a foreign government would not exempt it from the jurisdiction of the court, and immunity could not be granted to states acting as ordinary civil persons. The judgement cited a Belgian decision on the subject as well as previous Egyptian case-law.

At any rate the decision, like its predecessor, attached more importance to the concept of ownership by the foreign state, but the latter decision differs from the former in the test to be employed

to distinguish between the private and public character of the activities concerned. In the latter case, the court preferred to adopt the 'subjective' test, or the capacity in which the foreign government acted rather than the so-called 'objective' test, or the nature of the activities involved.

On the other hand, the seizure of two Egyptian vessels by the Soviet Government was held to be outside the jurisdiction of the Mixed Courts, because the act of seizure was a clear manifestation of the sovereign authority of the Soviet Union. It may be remarked that the above three cases do not provide a satisfactory solution to the difficulties inherent in the test which would permit the making of a distinction between private and governmental service of foreign state ships. However, it should be borne in mind that these cases were decided before Egypt became a party to the 1926 Brussels convention and its 1934 Additional Protocol,⁷⁹ which favoured a more restricted doctrine of immunity with regard to government-owned and operated vessels employed in commercial and non-governmental service. The convention expressly combined the character of the service with that of its purpose, thus providing a two-way system for solving the problem. Until its abolition in 1949, there was no incident in which a foreign state had been sued in respect of its ship, and the impact of the convention on the courts' jurisprudence thus remains unknown.

(c) Commercial transactions

Another important exception to the general rule of state immunity developed by the Mixed Courts is the commercial activities of foreign states carried on by one of its organs or agencies. The Mixed Courts, following the general trend of restricted immunity, assumed jurisdiction in cases where state organs were involved, on the same basis on which they declared themselves competent over actions brought against the foreign states themselves.

Generally speaking, in all cases concerning state-owned enterprises engaging in activities that were either private or

commercial in nature, it was the established practice of the Mixed Courts to assume jurisdiction. The first case involving a private contract conducted through a sovereign entity which was decided by the Mixed Courts was that of the Bank of Athens (1923).⁸⁰ In 1918, an Armenian resident in Egypt subscribed to an Armenian Republic loan at a branch of the Bank of Athens. In 1920 Russia occupied Armenia, and the subscriber claimed his share back from the Bank. The Bank argued that it held the money on behalf of the Armenian Government, and only the latter could make the appropriate order concerning the money. It was held by the District Court of Cairo that the plaintiff was entitled to the refund of his money. When the loan was subscribed, it was designed to help the Armenian Republic, a purpose that was no longer realizable since Russia had expressly declared its intention to absorb Armenia. Under these circumstances the Court concluded that Armenia's status was completely changed from that which was contemplated by the plaintiff when he had subscribed to the loan, and thus was no longer a republic for the purpose of the loan. However, the question of immunity was only marginal. The decision of the court appears to have been based on the non-existence of the foreign state rather than on its entitlement to immunity. But the refusal of the Bank's argument implied that, even if the Armenian Republic was still in existence, the plaintiff would still have been able to dispute the validity of the bank's right to hold the money on whatever other grounds. The decision was also seen as a popular one since it avoided any detriment to the considerable Armenian minority in Egypt.⁸¹

The first case in which a state-organized entity appeared before the court was that of Borg (1926).⁸² This was an action brought against the defendant Bank, an agency of the French Government, for the repayment of a deposit. The defendant contested jurisdiction, inter alia, alleging that the Bank was part of the French state and hence not liable to be sued in Egyptian courts. The court refused to accept the contention and declared itself competent on the basis of the implicit submission to jurisdiction by carrying out commercial activities outside her own

territory. The court observed that it was irrelevant "whether the defendant was separate from or incorporated in a French Department of Government". The exercising of banking functions, including the receiving of funds for deposit, were essentially private acts. According to the judgement, the Bank was a mere alterego or organ of the French Government. However, the plaintiff's claim was dismissed by the courts on other grounds.

Perhaps the most interesting point in the judgement is the notion of implied consent to submit to the jurisdiction which was identified by the courts to stem from the carrying out of commercial transactions by a foreign state outside its own territory. The courts had in effect entered an arena which was not well known in state practice and very little had been written on the point. It seems that the issue as far as the courts were concerned was not only that of principle, but also of practicality, in the sense that, when a foreign state entered the free market outside its frontiers, it consented implicitly to waive any state immunity in regard to its commercial activities. The second point of interest in the judgement relates to the determination of whether the bank was an organ of the French Government and thus entitled to immunity. The court focused attention on the relation between the French state and the Bank and found that the relation was solely a matter of supervision. In this context, the Courts held that the supervision exercised by the French Government was not considered to be sufficient by itself to transform the exercise of private rights into a manifestation of public authority.

Similarly, in the Monopole des Tabacs case,⁸³ the management of a tobacco monopoly was held not to involve an act of sovereignty as the state had extended its activities into the realm of private interests. The case concerned a plea of immunity from a suit by a former employee of the Turkish Tobacco Monopoly for damages for an alleged unfair dismissal. The Turkish Government claimed immunity, alleging that the monopoly was an agency of the Turkish Government and that the action could not be maintained in the Egyptian Courts. The Court of Appeal of Alexandria held that the Turkish Government

was not acting in its public capacity in conducting the tobacco monopoly and therefore it was impossible to accept the allegation that, as the plaintiff was an employee of the Turkish state, his dismissal was an act of public administration.

Apart from the characterization of the monopoly as essentially management of a business of a private character, the case added an exceedingly important exception to the general rule of state immunity, namely contracts of employment concluded by the foreign state or its agency and to be performed within the jurisdiction of the local courts. The recognition of this exception in effect amounts to a recognition of an independent cause of action in favour of an employee against the employer state. That is to say, the breach of a term of contract of employment, based on an existing contractual relation, is binding on the employer state for the performance of a service in the forum state. It is not clear from the judgement whether the jurisdiction of the court is based on the non-governmental nature of the monopoly concerned or on the specific breach of the contractual obligation arising out of the contract of employment. The courts appear to have combined both the elements to presuppose the existence of a valid jurisdiction. However, the court has left open the question of applicable law to the dispute, since the parties had not expressly chosen the law to govern their contractual relations, although the importance of the case is the point of jurisdiction and not the applicable law. Finally, the case tends to suggest that the legal consequences of dismissal in breach of a contract of employment were the result of an act done in the exercise of non-governmental authority and, therefore, immunity was implicitly recognized in cases where such legal consequences were a direct result of an act of public power. It should be recalled at this point that the area of contract of employment has been regarded as an exception to state immunity by the countries which have adopted national legislation on state immunity,⁸⁴ and is reflected in an increasing number of regional conventions and draft conventions on the subject.⁸⁵

An interesting case in which the claim of immunity was denied in relation to a commercial transaction on behalf of a foreign state was that of Egyptian Delta Rice.⁸⁶ In this case the Commercial Tribunal of Alexandria confirmed an order holding two Spanish organizations, the General Commissariat of Supply and Transport and the Industrial and Development Rice Federation, jointly liable on a contract to buy rice. The court applied the distinction between actes de gestion and actes de pouvoir with the result that the order against the two organizations was affirmed. The most interesting aspect of the decision is that the purchase of rice for the feeding of the Spanish population during the crisis that followed the Second World War was considered by the court to be a commercial transaction and not necessarily an act of the Spanish sovereign authority. The court characterized the transaction as commercial since,

in negotiating this purchase herself, instead of leaving the matter to private enterprise, Spain proceeded in much the same manner as any other Spanish trader would have done who wanted to buy rice in Egypt, that is she got it out of Egypt with the necessary permit and carried it to Spain in a Spanish ship in order to re-sell it on the usual commercial lines. 87

It is worth noting that the distinction drawn by the court, between commercial and public transactions, was somewhat harsh, since in buying the rice, the Spanish Government was exercising its responsibility to its people, and as such the transaction should have been safeguarded by immunity. The court, however, refused to take account of the motive of the Spanish Government in purchasing the rice and rigidly preferred to determine the function of the Spanish organization by reference to the nature of the act. Taken in this context, the decision was regarded as an extreme example of commercial transactions.⁸⁸

Further, the Mansourah District Court affirmed a decision of the Summary Tribunal that the Mixed Courts had jurisdiction over the Palestinian Railways.⁸⁹ The court assumed jurisdiction in an action against the Palestine Railways, notwithstanding the plea that it was a state organ and immune from liability. The court classified the activities of the Railways as a commercial venture of the Palestine Government on the following grounds:

1. In conducting a railway undertaking the Government of Palestine was performing an act of administration; 2. by making the contract of carriage it had entered the sphere of private law; and 3. in view of the fact that the contract was to be performed in Egypt, the Mixed Courts had jurisdiction.

The decision is a clear judicial endorsement of the restrictive doctrine of immunity based on the concept of trading activities of a foreign state. It may be remarked that the judgement has not only affirmed non-immunity in respect of a commercial contract but has also added another element or qualification, namely, that the contract has to be performed within the forum state or within the jurisdiction of the local courts, for the latter's competence to be perfected. In this way the court relied not only on public international law but also on rules of private international law to determine issues of jurisdictional competence over foreign states.

A decision following closely on the lines here laid down was rendered on 14 February 1927 by an Italian judge sitting in the Court of Referee in Cairo,⁹⁰ when he held that the renting of a furnished villa by the Sudanese Government was not an act of public authority but a contract of private law, for which the government was subject to the jurisdiction of foreign courts. Hence the judge was competent to order the making of an inventory required by the tenants upon the handing over of the villa.

Cases of commercial activities of foreign states continued to appear before the Mixed Courts until its last days. Shortly before the courts were finally closed down, the Mixed Courts in Cairo held that a contract for the purchase of immovables by a foreign legation to be used as an "hotel diplomatique" constituted a commercial act and not a sovereign act and therefore was subject to local jurisdiction.⁹¹ Thus the buying of immovables for use by a foreign embassy was essentially a commercial activity, and immunity should not be granted to foreign states concerned in a case in which a dispute has arisen out of the performance of the contract of purchase. The fact that the immovable was intended to be used for a diplomatic mission did not seem to the court to be relevant nor did it influence the decision in any degree. If it had, then the

decisive test would have been the purpose of the contract rather than its nature and, by ignoring that purpose, the court was manifestly emphasizing the character of the contract rather than its motive.

2. Sovereign Immunity and Acts of Confiscation

In 1927, the Mixed Court of Alexandria was called upon to consider the effect of an act of confiscation and recognition on the issue of jurisdictional immunities.⁹² In this case, the "Costi", a vessel belonging to the plaintiff, the National Navigation Company of Egypt, had been seized on the high seas by a band of men alleged to be acting under the instruction of the Russian Government, taken to Odessa, confiscated by a decision of September 2, 1927, and fitted out as a part of the Soviet merchant fleet. While the vessel was anchored in Alexandria, the plaintiff had issued a writ claiming its possession. The referee judge of the tribunal, in delivering the judgement of the court, held that the court was incompetent. He held that, however illegal and reprehensible the confiscation, it was incontestable that, in using the force of arms as well as the authority of its judiciary in getting possession of the "Costi", the Soviet state was manifesting its sovereign authority. As to the contention that the Soviet Government had not been recognized by the Egyptian Government and thus enjoyed no immunity for its acts, the court observed that the fact that the USSR had not been recognized by Egypt might have diplomatic and political consequences in the relations of the two governments, but it would not sanction the refusal on the part of the judges to accord to the USSR the prerogatives it enjoyed as a sovereign state or to admit its undeniable existence. An order was thereupon entered to lift the seizure.

3. Jurisdictional Immunities of Foreign Armed Forces

The Mixed Courts of Egypt granted jurisdictional immunities in cases clearly involving manifestation of public authority. Belonging to this category were cases involving members of foreign armed forces. Certain actions brought by individuals against members of foreign armed forces were not allowed to proceed because these actions were clearly regarded as impleading an agent of a foreign state exercising a duty for that foreign state. To that extent they were regarded as clear cases of sovereign immunity.

In the Guebali case⁹³ the claimant leased his villa in Cairo to the head of the French Military Mission in Egypt. After the expiry of the lease, the defendant refused to give up possession of the villa and claimed sovereign immunity as a member of the allied forces in Egypt. The court rejected the defendant's argument and ruled that, in the absence of a specific agreement between Egypt and France, the transaction was an ordinary contract between a landlord and a tenant and had nothing to do with sovereign immunity. A state acting in its private capacity was not exempt from the jurisdiction of the local courts and there could be no justification for an agent of the state to be accorded immunity in relation to his private business.⁹⁴ On the other hand the rule of sovereign immunity was recognized by the Mixed Courts in cases involving accidents which occurred during military transportation. The Mixed Court of Appeal granted immunity to the Greek Government in an action by a plaintiff who was a victim of physical injury caused in an incident involving a lorry belonging to the Royal Hellenic Air Force. The court ruled that the Greek Government was immune from the jurisdiction of the local courts because, in conducting the operation of military transport, it was acting in its sovereign capacity and was thus jurisdictionally immune.⁹⁵

The above cases were decided on the general principle of law developed by the jurisprudence of the Mixed Courts in this area. At the outbreak of the Second World War, the defence of Egypt was assumed by British forces. Egypt concluded with Britain, on

26 August 1936, a treaty agreeing to the terms by which immunity from jurisdiction for the British soldiers and sailors was considerably extended. By Art. 4 of the treaty it was agreed that no member of the British Forces "should be subject to the criminal jurisdiction of those courts in matters arising out of his official duties".⁹⁶ The exemption expressly provided for was unequivocally confirmed by the Mixed Court of Appeal in the case of Ministere Public v. Edward Alexander Spender⁹⁷ in which an action for damages for an assault was brought against Spender, a civil servant with the British forces in Egypt. The court refused to entertain the action and held the immunity to extend to all the legal consequences of the criminal acts of the defendant.

But the majority of the cases touching the issue which were decided by the courts, were concerned not with members of the British forces proper, but rather other foreign armed forces allied to them. The question before the Mixed Courts was, therefore, whether in the absence of such formal agreement with other powers Egypt tacitly agreed to receive onto its territory other foreign men-of-war allied to the British forces and to accord them the benefit of the provisions of the 1936 Treaty or other similar privileges and immunities. Since, by virtue of Art. 1 of the above Treaty, the term "British Forces" was defined to include three classes of persons, viz. i- soldiers, sailors and airmen; ii- every civilian official of British nationality accompanying or serving with the said forces, who was either granted relative status as an officer, or held a pass designating his status, and who was paid out of the British public funds; iii- wives, and children under 21 years of age, of the person mentioned in the preceding paragraphs, the matter was further complicated by other provisions of the convention: in particular, the Special Article by which the privileges and immunities thus conferred were enjoyed only by persons "stationed with or attached" to the British Forces who were sojourning in Egypt in accordance with the terms of the Treaty of Alliance.⁹⁸

The first case in which the Mixed Courts addressed the question of assimilation was that of Triandafilou.⁹⁹ The appellant, a Greek subject, being a sailor on a torpedo boat of the Greek fleet, struck with a knife an agent of the local police. He was convicted by the lower court and imprisoned for eight months. He appealed against this judgement on the ground of the incompetence of the Mixed Courts. The Court of Cassation rejected any suggestion that the Egyptian Government had tacitly conceded to the members of the Greek forces the same privileges and immunities that had been enjoyed by the British forces under the 1936 convention. Having thus rejected any assimilation between the two forces, the court proceeded on the question of jurisdiction according to the general principles of law and excluded at the outset the immunity of the warship since the defendant was arrested on shore. The court observed that the opinions of jurists were divided concerning the extent of immunities of members of crew when they had gone ashore. The court cited the Resolution of the Institute of International Law at its Stockholm meeting in 1928 as being a consolidation of the relevant rules of international law, and which was considered by the court as a substantial reproduction of a similar work culminating in the adoption of the Hague Rules of 1898 on the subject. The Resolution in part stated that:

.... if personnel of the vessel while on shore on duty, whether individually or collectively, are charged with offences committed on shore on duty, the territorial authority may proceed to their arrest but must deliver them over to the commander of the vessel upon demand.

Basing its consideration on the above Article, the court confined itself to the question as to whether the defendant was on duty when he committed the offence. The court ruled that the sailor was still on duty when he committed the offence since he did not return on board to give an account of his deed. Being on duty was considered by the court to be based on the nature of the order given by the commander and not with regard to the person carrying out the order. The court found that the defendant was sent ashore to obtain supplies for the vessel and as such he was on official duty regardless of his criminal actions and was thus immune from criminal prosecution.

Although the decision seems sound as to the determination of the crucial time at which the defendant was held to be on prima facie official duty, the same cannot be held to be true as regards the nature and the circumstances in which the crime was committed by the defendant. To regard the defendant as still on duty when he was drunk and had stabbed a policeman is to extend the immunity of members of the crew beyond the reason for which such immunity was intended. The decision was criticized by an American commentator on the subject,¹⁰⁰ who took the view that the Resolutions of the Institute of International Law cited by the court were intended for application to foreign armed forces in time of peace, and Egypt was de facto at war and thus, according to his view, the court was wrong to borrow the rules embodied in the Resolutions as a base for its decision. However, the defence can rightly be justified on grounds of technicality since the Mixed Courts were seeking to apply their jurisdiction on sensitive occasions and to strike a balance between the desirability of enforcing the ordinary law with the needs of the military forces stationed in Egypt for its defence.¹⁰¹

The Mixed Court had another opportunity to examine the status of members of the Greek forces in Egypt in a case involving a Greek subject who was charged with criminal misappropriation before he joined the service.¹⁰² The defendant was prosecuted on the charge of having continuously, from 1934 to 1938, misappropriated funds which he managed as a business agent of a certain Nicolas, who had become insane. After the prosecution was started, and while the case was at the preliminary stage before the correctional court in Cairo, the defendant joined the Greek Air Force in Egypt and immediately maintained that the jurisdiction of the Mixed Courts had been divested by his incorporation in the said force. He also argued that the consent to the sojourn of the Greek troops is given without reservation and as such involves as of right, in virtue of international custom, complete immunity from jurisdiction as decided by the Schooner "Exchange" case. On the other hand, the Egyptian Government argued that it did not agree to grant to the Greek troops the benefit of immunity from jurisdiction whether in civil or

criminal matters, but the sole option of applying their military code "within the limits of the Greek army".

The court rejected the defendant's plea of immunity, relying inter alia on the official notice given by the Egyptian Government on the subject of the character clothing the sojourn of the Greek troops in Egypt and its previous decision in Spender's case. The court also rejected the defendant's interpretation of the rule laid down in the Schooner "Exchange" case, that the licence given to the Greek troops to enter Egypt implied complete jurisdictional immunity as a matter of international custom. The invitation of the Greek troops to enter the jurisdiction of Egypt could not be interpreted as a surrender of its sovereign power, an interpretation which was well excluded by the fact that Egypt had expressly denied general immunity in civil cases save as secured by the rule of state immunity. For these reasons the court declared itself competent.

It may be remarked that the court, faced with the absence of a special agreement governing the status of foreign armed forces in Egypt, referred the matter to the Egyptian Government for its official views and, on receipt of such views, the court regarded them as highly relevant for the determination of the issue before it. This policy appears to be in conformity with the new political climate following the adoption of the Montreux Convention of 1937 which was designed to remove all the restraints placed on the right of the Egyptian government to enact laws concerning foreigners in the country, and further reinforced by the established jurisprudence of the Mixed Courts to draw the distinction between private and public acts of foreign states.

Cases involving members of foreign armed forces without specially agreed immunity continued to appear before the Mixed Courts. The next case involved a Spanish member of the French Foreign Legion in Egypt.¹⁰³ The defendant was remanded before the Court of Assizes for having, on 1 September 1943, attempted to murder one Tahan, while on land in Egypt outside premises occupied by his unit. He raised the question of the competence of the

jurisdiction of the Mixed Courts by arguing that there was in existence an international custom, according to which a soldier who is a member of a body of troops present in a foreign country with the consent of the sovereign of that country is subject only to the jurisdiction of the military courts of his own country to the exclusion of other jurisdiction.

Once again, as there was no agreement between France and Egypt relating to the immunities of French troops from the jurisdiction of the Mixed Courts, the court reviewed at length the whole question of military immunity and laid special emphasis on the distinction between simple sojourn or passage of troops and occupation of territory. The court referred to the Anglo-Egyptian Treaty of 1936 (Arts. 1 and 8), for guidance to the solution of the difficulties inherent in that distinction and also to the situation of Great Britain in whose territory a large number of foreign troops were present and whose status had remained intact and undisturbed throughout the Second World War.

The Court of Cassation ruled that a tacit renunciation of sovereignty could not reasonably be presumed, and stated that:

.... the Allied troops found in Egypt are not in occupation of the territory; their activity is limited to purely military activity within the confines of the premises which have been assigned to them and in the centres of military operations properly speaking without any public or administrative control over the whole or any part of the territory.

Accordingly, the defendant's contention that he was governed by French law was rejected.

The court agreed that the local courts could not interfere in the internal administration of the military regulations peculiar to the forces themselves, but pointed out that violation of common law outside the military premises and without the soldier being on duty at the time was the subject of doctrinal debate and different judicial practice. American, British and Australian practice were cited by the court, to show that the presence of foreign forces within the local jurisdiction was exceptional and their immunities

could not easily be presumed. The court also referred to the Bustamente Code of 1928 to the same effect.

The court declined to accord immunity from jurisdiction to the defendant on the ground that he was not on duty at the time of the offence, and was outside the military premises for his own private purposes. It held that there was no generally established doctrine of immunity in international law in favour of foreign troops present within the jurisdiction of another country with the latter's consent.

The court rejected the appellant's claim that the Montreux Convention of 1937 had transferred to the jurisdiction of the Mixed Courts dating back to the period of the competence of the Mixed jurisdiction, and that the French consular courts had always declined to assume jurisdiction for the application of the French military code in Egypt and thus the Mixed Courts cannot have a wider competence than that possessed by the consular jurisdiction. The court regarded the Montreux Convention as having enabled full recovery of Egypt's sovereignty in criminal matters and full freedom to legislate in regard to foreigners without regard to previously applied foreign law.

The decision was regarded as a landmark, since it combined various strands of the previous judgements, and resorted to comparative law techniques by citing, analysing and examining international opinions and the judicial practice of other jurisdiction on this point.¹⁰⁴ The decision also illustrates the consistent adherence on the part of the Mixed Courts to draw a distinction between private and public acts not only in relation to foreign states but in relation to their representatives as well. Finally, the decision may also be regarded as a further step towards the revival of the Egyptian sovereignty as far as jurisdiction over foreigners is concerned.

The rejection by the Court of Cassation of the contention that there was a general immunity in time of war under which all members

of the armed forces of a foreign power stationed or passing through the territory of another power was upheld by the same court in another case. In the Minister Public v. George Anne¹⁰⁵ case, the court dismissed a similar contention raised by the appellants who were members of the crew of French warships anchored at Alexandria and were accused of avoiding detention after their arrest in connection with robbery and other crimes. The court also rejected the contention that it was for France to punish the appellants or to decide whether they were more useful on board a warship or in prison.

This case may be contrasted with that of Korakis.¹⁰⁶ The defendant and three other members of a ship belonging to the Greek fleet anchored at Port Said were charged with having caused grievous bodily harm to one Zoumberos. The police arrested them and handed them over to the military police of their own country. When they were later charged with the offence mentioned, they pleaded the incompetence of the Mixed Courts. Their contention was supported by the commander of their ship, who based his objection on the Resolutions of the Institute of International Law of 1928.¹⁰⁷ The court in the first instance accepted the objection and the Parquet appealed on behalf of the Egyptian Government against the judgement. In dismissing the appeal, the courts adopted the view that the Resolution cited by the respondent must be regarded as applicable in time of war as well as in time of peace.

The discussion of the matter by the court centred on striking a balance between the two rival principles: the principle of territorial jurisdiction and the legal fiction that the warship is a floating territory of the flag state. The second of these two principles involved the result that members of the crew enjoyed 'by way of extension' personal immunities which would result in withdrawing the crew to a greater or lesser extent from territorial jurisdiction. In the court's opinion the question was not one of the existence of jurisdiction but of the exercise of such jurisdiction. Thus, if the commander waives such personal immunities, e.g. by handing over the offender to the local

authorities, the territorial power recovers the exercise of jurisdiction. "If, however, the commander only surrenders them subject to the reservation that he does not abandon the exercise of jurisdiction already vested in him", this condition must be respected by the territorial power.

On the other hand if, having arrested the offenders, the local authorities handed them over to the commander of their vessel without reservation the courts of the state whose flag the ship flies recover their competence. If the surrender of the offenders, in this case by the local police to the Greek authorities, was done without any such reservation, the latter could properly claim the exercise of jurisdiction by their courts according to Art. 20 of the Resolution referred to above.

The reasoning of the court, while valid in itself, seems to deviate from the principle already established by the previous decisions that members of the crew when arrested on shore in relation to penal charges were still subject to the competence of the courts in the absence of an agreement with their countries as to their privileges and immunities. The Resolutions of the Institute place much emphasis on the question whether the sailor was on official duty when he committed the offence, whereas the court avoided the question of whether the defendants as sailors were on duty or not. Furthermore, the court regarded the principle of the immunities of a warship as vital to the determination of the issue, whereas it was clear that the respondents were arrested on shore. To this extent, the extension of the immunities of the crew to cover acts committed outside the ship is a far reaching extension which cannot be easily supported by the established jurisprudence of the Mixed Courts in this area.

Cases concerning immunities of members of foreign armed forces continued to appear even after the close of the Second World War and right up to the last few days immediately preceding the abolition of the Mixed Courts. The majority of the cases decided by the Mixed Courts in that period were cases involving the British armed forces

which were subject to the Anglo-Egyptian Convention of 1936. In this way they posed no particular problems to the Mixed Courts, and constituted a group of straightforward decisions if compared with the other cases.

Two cases will illustrate the attitude taken by the courts with regard to this category. In the Hanon case,¹⁰⁸ decided by the Civil Tribunal of Alexandria, the Military Governor in Egypt requisitioned the plaintiff's villa in Cairo in June 1943 to be used for the British troops in Egypt. The requisitioned premises were leased to the British forces for the Lord High Admiral of Great Britain. During the tenancy a substantial part of the property was destroyed by fire and the claimant brought an action for damages against the Egyptian Government and British Admiralty. In a note communicated by the British Foreign Office to the court, it was stated that "His Majesty's Government is not subject to the jurisdiction of the court in Egypt". At the hearing, the Admiralty chose not to appear and the claimant asked for judgement against it by default.

The court held that it was not entitled to exercise jurisdiction over the Admiralty. It relied partly on the general principle of state immunity, the effectiveness of which required that agents of foreign governments should be accorded similar immunities for acts done in their official capacity. The court identified the Anglo-Egyptian Treaty of 26 August 1936 as the source of such immunities as far as the British forces in Egypt were concerned. The court stated that:

It is a matter of common knowledge that members of the British forces in Egypt were not subject to the jurisdiction of the Egyptian courts for matters arising out of their official duties. This is an exceptional privilege secured for the members of its forces by the United Kingdom Government. It would become a dead letter if the Egyptian courts were to allow plaintiffs to consider members of the British forces as representatives of their government and if the court in this case were to authorize the plaintiff by these means to sue the British Government directly as responsible for the acts of the British Admiralty. 109

The second case was that of Hewet v. The Treasury.¹¹⁰ The appellant claimed that he was exempt from all taxes in respect of a commercial transaction performed by him, on the ground that he was a member of the British forces in Egypt which were exempted from taxation according to the provisions of the convention accompanying the Anglo-Egyptian Treaty of 1936. The Egyptian fiscal authorities argued that road taxes, licence fees, taxes deducted from commercial enterprises or share dividends were not within the exemption as purely commercial income taxes. The court in the first instance held the defendant was not so exempt.

The Mixed Court of Appeal dismissed his appeal and held that the immunity granted by the 1936 Treaty only applied to the British camps and forces as a whole, together with individual members of the troops in their capacity as members. In other words, in the opinion of the court a distinction should be drawn between the activities of those individuals not in the exercise of their functions and activities which have a direct relation to military services. In the light of this consideration the court concluded that the appellant was carrying on an enterprise which was essentially his personal business and had nothing to do with his military services. The decision dispelled any doubt that might have existed concerning the interpretation of the provisions of the treaty regarding exemption from taxation. The decision also served as a useful guideline for the Egyptian fiscal authorities that such exemption could only be granted in regard to activities which had a clear connection with the military service. This guideline was vital since quite a number of the local British community with business interests had been incorporated in the British troops.¹¹¹ These sorts of problems were already within the court's consideration when it was observed that:

.... The High Contracting Parties at the time of drawing up the Treaty of 1936, which convention was the basis of any exemption, did not contemplate the case of members of the British Forces recruited within the country but only that of military forces which normally came from abroad. 112

If the defendant in this case was allowed to escape jurisdiction that would amount in reality to a new kind of capitulation.

The cases decided by the Mixed Courts concerning jurisdiction over visiting armed forces may be divided into three categories. The first concerns those actions which were brought by private individuals against members of foreign states armed forces whose immunities were not regulated by an agreement with their respective powers. Cases belonging to this category are legal actions involving purely civil matters. The courts assimilated those members with their respective sovereigns on the general rule of state immunity as they were organs or representatives of foreign states. The courts drew a clear distinction between acts done by a soldier or sailor in the course of his official duties and those performed in his private capacity, and declined to assume jurisdiction only over the former. What the courts had done was simply to extend the restrictive view of immunity which they applied in actions against foreign states to civil actions brought against the members of foreign visiting forces.

The second category concerns those legal actions brought against members of foreign forces and involving violation of the Egyptian penal law. The majority were brought by the Egyptian Government, while some also involved private litigants. Of this group, the courts have relied on international usage and doctrine on the subject and tried to find a workable solution to many problems arising out of the exercise of criminal jurisdiction over members of foreign troops. The matter was further complicated by the absence of agreements regulating the immunities of those forces from the Egyptian local courts. When it is recalled that the Second World War brought a very substantial number of foreign military personnel from various countries, the significance of those decisions becomes more apparent. It should be noted that none of these cases involved jurisdiction over acts committed within a camp nor acts occurring on board warships or aircraft. Further, these cases were decided on the clear understanding that they were incidents involving jurisdictional immunities relating to the public armed forces of

friendly foreign states as distinguished from hostile forces. In most of them the court had emphasized the fact that these troops were present in Egypt, not as occupying powers but as cooperating forces to fight the Second World War.

The decisions of the Mixed Courts in this group of cases are overwhelmingly against any theory of absolute immunity from the exercise of criminal jurisdiction over foreign armed forces.¹¹³ Although the courts had attempted, somewhat unsatisfactorily, to grant the offender the immunity enjoyed by his warship,¹¹⁴ it is quite clear that no absolute immunity arose, but only a priority of the right to exercise jurisdiction. In most cases the Mixed Courts expressly refused to interpret the tacit consent of the Egyptian Government to the presence of those troops within its territory as a surrender of sovereign rights to administer its penal law to all the inhabitants of the country and thus took a firm legal standing which seems to correspond to the intention of the drafters of the Montreux Convention of 1937 who agreed that Egyptian sovereignty should be revived and that the Egyptian Government should recover its full freedom to legislate on penal matters.

The third group of cases are those concerning the British forces in Egypt whose immunities were specifically regulated by the Convention annexed to the Anglo-Egyptian Treaty of 1936. Prior to the treaty the status of the British troops in Egypt was somewhat anomalous. In a single case decided by the Mixed Court of Alexandria in 1932,¹¹⁵ it was held that the British forces were completely exempt from the exercise of jurisdiction by the local courts. In that case a member of the British forces in Egypt ran over the claimant and caused her injury. A military tribunal had rejected her claim and she brought an action against Colonel E.S. John, the British Commander. It was held that, although there was no agreement between Egypt and Britain regulating the immunities of British troops from local jurisdiction, yet international law recognized such immunity. Although it is not clear from the report in what context international law was applied to the incident, it could be argued that the position of the British troops in Egypt

before 1936 was not the mere presence of visiting troops but the presence of an occupying army, albeit in a peaceful manner, and this might have influenced the judgement to some extent. The court also considered it unnecessary to examine whether in principle a distinction may be made between private acts and public acts, because it was found by the court that it was not disputed that the act in question falls into the latter category. Thus the judgement seems to be based on the assimilation of representatives of foreign troops with their sending powers. It is probable that it was in relation to this part of the judgement, the reference to international law was made. However, the immunity of British forces in Egypt had been regulated extensively by the Anglo-Egyptian Treaty of 1936, due to the change in the status of these troops from an army of peaceful occupation to that of visiting forces. Following the ratification of the treaty and its annexed convention, any immunity the British forces might claim from the exercise of local criminal jurisdiction had to be traced to the relevant provisions of Art. 4 of the Convention.¹¹⁶ It was agreed that:

No member of the British forces shall be subject to the criminal jurisdiction of the courts of Egypt, nor to the civil jurisdiction of those courts in any matter arising out of his official duties

Accordingly, any case which did not come within the terms of this article would be subject to the jurisdiction of the local courts. Following the ratification of the convention of 1936, the Mixed Courts, as discussed previously, had attempted to interpret the provision in a restrictive manner, and to prove that the cases did not fall within the terms of the article and to assume jurisdiction consequently. These attempts had actually resulted in establishing exceptions to the apparently absolute immunity enjoyed by the British forces in Egypt before the 1936 Convention. The significance of these efforts does not lie in their success or failure, but as it was stated:

They illustrate the metamorphosis which the British Forces in Egypt had undergone. Whatever the immunities these forces had enjoyed previously as an army of peaceful occupation of Egypt were now ended. 117

Under the new regime, the only immunities which the British forces could enjoy from the jurisdiction of the Mixed Courts were those privileges and immunities which directly flowed from Art. 4 of the Convention and from nowhere else. It is in these considerations that the real significance of these judgements lies.

The result of the review of all these cases demonstrates abundantly the significant contribution made by the Mixed Courts to international law in their treatment of the problems raised by the presence of foreign armed forces in Egypt - a problem that in several other countries has aroused long, and even bitter, controversy. Acute problems were satisfactorily resolved by the application of the simple test of service commande. The majority of cases were decided by the courts by asking whether the soldier or sailor was on duty or off duty at the time of the commission of the offence. The test was proved to be valuable and received a general welcome from international lawyers.¹¹⁸

To this extent they succeeded in drawing a careful balance between the needs of military operations and Egyptian's sovereign interests and to prevent the former from becoming a source of annoyance to the latter. Moreover, the exercise of jurisdiction over foreign troops was especially important in a country like Egypt where there were a large number of foreign forces of various powers, so that law and order might be preserved. It was also essential in other directions, particularly the rising nationalist resentment against the number of privileges and immunities enjoyed by these forces, and both the Anglo-Egyptian Treaty of 1936 and the Montreux Convention of 1937 were designed to suppress this source of anxiety to the Egyptian Government.¹¹⁹

4. Immunity from Attachment and Execution

In this area of state immunity, as in others, the practice of the Mixed Courts ranged on the side of the continental doctrine of sovereign immunity. Thus foreign governments which had been validly held not to be immune from suit, and had been adjudicated to

be liable on some obligations, were likewise held not to be immune from measures of attachment and execution.

In a case involving an action between an individual and the Greek treasury,¹²⁰ the Mixed Court of Appeal made it clear that difficulties concerning the execution of a judgement against a foreign government were not a factor in deciding whether a foreign government was subject to the jurisdiction of the Mixed Courts or not. It further drew a distinction between immunity from jurisdiction and immunity from execution. In the opinion of the court, these were separable and independent from one another. While the former concerned the determination of the right of the parties in the dispute, the latter related more specifically to the immunity of foreign state property from pre-judgement measures, as well as from execution of the judgement rendered. Thus, difficulties arose as to the execution of judgements which it had rightly been said did not affect the assumption of jurisdiction in the first place.

Another view that has been advanced in the judicial reasoning of the Mixed Courts was that immunity from execution was rejected once jurisdiction had been exercised on its merits. This view was reflected in the decision of the Court of Appeal in the Monopole des Tabacs case,¹²¹ when the court not only assumed jurisdiction and rendered judgement against the Turkish Government, but also confirmed the attachment of Turkish state property which had been ordered by the lower court. The court relied on the jurisprudence of the Mixed Courts, according to which there was no reason to exempt foreign states from measures of execution of judgements obtained against them upon property which they possessed in their private capacity or actually used in their commercial operations. In this context the decision of the court was entirely in accord with the restricted view of immunity it applied to the stage of jurisdiction. At least in conceptual terms, there is no valid reason why a distinction should not be drawn between property used for public purposes and that used for commercial activities. Furthermore, the decision also appears to provide sufficient

safeguards to property belonging to foreign states in their sovereign capacity and thus excludes execution in regard to property covered by diplomatic immunities or any other property used in governmental services or dedicated for public purposes.

This view was further confirmed by the decision of the Commercial Tribunal of Alexandria in the Egyptian Delta Rice case,¹²² where the court affirmed an order of execution given against the Egyptian assets of two Spanish organizations, and rejected the contention that the organizations were absolutely immune from execution as an 'organisme d'Etat'. It should be borne in mind that the order sought to be set aside was essentially a pre-judgement measure and not strictly speaking an execution of judgement. Hence there was a need here to uphold immunity for obvious practical reasons, for if the suit was directed against the state or its property, immunity could be invoked by the state to prevent the continuation of the proceedings.¹²³ Immunity from jurisdiction thus upheld would make attachment of state property pointless, as there would be no principal claim in respect of which attachment may be sought to satisfy an eventual judgement.

5. Conclusion

The above survey of the judicial practice of the Mixed Courts clearly shows the acceptance of the then so-called Italo-Belgian practice on state immunities which is based on the distinction between actes de gestion and actes de pouvoir. The adherence to that practice was a direct result of the influence of various factors in operation at the time when the courts were established.

Apart from the influence exerted by the judges of the courts, who were derived from continental Europe, other evolutions in legal analysis had greatly contributed towards the adoption of a restricted theory of immunity by the courts. In identifying these factors, there is a series of inter-related streams of legal precepts to which that evolution may be attributed:

1) The Mixed Courts, according to their charter, had exclusive jurisdiction over civil and commercial disputes between natives and foreigners, and between foreigners of different nationalities. Later the court went beyond the letter of their Reglement and assumed jurisdiction whenever mixed interests were traceable. This formula of mixed interests brought within the competence of the Mixed Courts all disputes in which foreign states and their organs were directly involved.

2) The courts also had jurisdiction over the Egyptian Government, administration and estates of the Khedieve and his family, when foreigners were involved in a suit against them. The disputes in which the Egyptian Government was involved were significant to that evolution in two respects: a) they had somewhat broadened the extent to which the Egyptian Government was made subject to domestic law for its private activities and b) they provided the courts with ample opportunities to distinguish between the public and private capacity of a sovereign. It was essentially on the basis of that distinction that in later years the Mixed Courts developed the restrictive theory of state immunity.

The restrictive theory had been consistently followed by the courts right up to their dissolution in 1949. The courts had adopted every possible limitation of immunity whenever the dispute resulted from the operation of what might be considered a normal commercial transaction not by its nature involving the performance of an act jure gestionis. Transportation of passengers by sea; administration of state railways; government commercial monopolies; the renting of immovable property; contracts for the purchase of merchandise for sale and the exercising of banking functions, all had been condemned because they were measures taken outside the confines of the governmental mission. A considerable freedom was exercised by the courts in determining what other acts should be included in this category.

In contesting the jurisdiction of the Mixed Courts over foreign states, it has been argued that, because there is no possibility of

enforcing judgement against a foreign state, there should be no possibility of exercising jurisdiction against a foreign state. In other words, it would be unreasonable to admit competence in the courts which would result in an empty judgement. On this issue, the Mixed Courts had expressly denied that the validity of a judicial decision was dependent upon matters concerned with execution. The difficulty of enforcing a judgement against a foreign state was not a factor in deciding whether that government was within the jurisdiction of the Mixed Courts. Moreover, every judicial decision exerted some kind of moral pressure on the parties concerned. This moral pressure is more powerful than the most energetic method coercion. What is even more clear is that the Mixed Courts had actually ordered and affirmed measures of execution against property of foreign states, thereby going beyond the continental doctrine in this respect.¹²⁴

On the other hand, the Mixed Courts had treated cases of confiscation as an act of public authority and ruled that it is outside the competence of the courts, however illegal the act of confiscation might be. In carrying out such an act the foreign state was regarded as immune from suit in relation to the property confiscated on the ground that the foreign state would be manifesting its sovereign will. To this area of immunity the Mixed Courts had added cases in which members of foreign armed forces were involved, since they clearly involved the exercise of sovereign authority although the rule of absolute immunity was not found to be implicit in them. Most of these were cases decided under the provisions of a bilateral agreement which were determined by the special circumstances in which they had come into being. Apart from such cases, restricted immunity was uniformly applied by the courts in cases involving foreign armed forces in Egypt. However, it is of interest to mention that the judicial practice of the Mixed Courts clearly proceeded from the presumption that territorial jurisdiction was the basic norm and cases of state immunity would thus appear to be exceptions to that general rule. In other words, the courts regarded its jurisdiction as the starting point, the normal situation, whereas immunity was the exception. This also partly

explains the restrictive trend adopted by the courts towards state immunity. If one realizes that the rule of state immunity as first down was then modified later by the industrial, commercial and technological progress of the international society, it becomes very interesting to compare the sharp increase in the practice of restrictive immunity by the Mixed Courts since its establishment in the 19th century, a comparison which clearly reveals a reversal order of events in the historical development of the law of state immunity. The jurisprudence of the Mixed Courts relating to state immunity clearly illustrates the contribution they made to the development of the law, both on issues of jurisdiction and enforcement. Their decisions were regarded as being solidly based on valid ground and were generally welcomed in various parts of the legal world. They were cited and analyzed by the courts of other countries and discussed by international writers.

The decisions of the courts also refute the view that the establishment of those courts was primarily designed to protect the interests of foreign powers in Egypt. They show that justice was handled according to the merits of the case and not on the identity of the parties. Jurisdiction was assumed over foreign governments regardless of their influence or position in Egypt's administration, whether they were British, French, Turkish or American, and the nationality of the judges did not seem to influence the judgements rendered to any measurable extent. The decisions rendered against foreign states were carried out without any recorded protestation on the part of those states, even although they may have strongly disagreed with the result. Therein lies the significance of the jurisprudence of the Mixed Courts on issues of sovereign immunity.

B. JUDICIAL PRACTICE (2): THE PRACTICE OF THE NATIONAL COURTS

IV. THE ABROGATION OF THE MIXED COURTS AND THE ESTABLISHMENT OF THE NATIONAL COURTS

The existence of the Mixed Courts in Egypt was regarded as a limitation of judicial sovereignty and a gross injustice, since the country in which they had originated in the 18th century had finally abrogated the capitulations and this was recognized by the Treaty of Lausanne 1923.¹²⁵ The Anglo-Egyptian Treaty of 1936¹²⁶ aimed at a complete suppression of the legislative and fiscal immunity of foreigners in Egypt and was concluded after a prolonged course of negotiation. This treaty at last brought to an end a chapter in the history of the capitulations in Egypt which had begun earlier in the 17th century with the introduction of the Ottoman laws and treaties in Egypt.¹²⁷

Britain recognized that the capitulatory regime which was actually in existence was incompatible with the spirit of the times and the actual situation in Egypt (Art. 13). Egypt would enjoy complete control over her own affairs; the British Army would retire from Cairo to the banks of the Suez Canal; and Egypt would be permitted to resume her active participation in the administration and control of the Sudan.

As far as the capitulations were concerned, the new policy was summarized in the first clause of the Annex to Art. 13:

It is the object of the arrangements set out in this Annex (1) to bring about speedily the abolition of the capitulations in Egypt, with the disappearance of the existing restrictions on Egyptian sovereignty in the matter of the application of Egyptian legislation (including financial legislation) to foreigners as its necessary consequence

The legislative attribution of the Mixed Courts was to cease. Clause 5 of Art. 13 states:

.... the present legislative functions of the Mixed Tribunals as regards the application of the Egyptian legislation to foreigners will terminate. It would follow from this that the

Mixed Tribunals in their judicial capacity would no longer have to pronounce upon the validity of the application to foreigners of an Egyptian law or decree which has been applied to foreigners by the Egyptian Parliament or Government, as the case may be.

The Treaty contained a precise agreement that the Mixed Courts were to be maintained during a transitory period still to be fixed. It was an object of the agreement according to clause 1:

.... to institute a transitional regime for a reasonable and not unduly prolonged period to be fixed, during which the Mixed Tribunals will remain and will, in addition to their present judicial jurisdiction, exercise the jurisdiction at present vested in the consular courts. At the end of this transitional period the Egyptian Government will be free to dispose with the Mixed Tribunals.

It is clear that these clauses provided for the total abolition not only of the judicial privileges of foreigners resident in Egypt, but of their legislative immunity as well. All that remained was the declaration, made by the Egyptian Government in clause 6 of the Annex, that legislation applied to foreigners would not be "inconsistent with the principles generally adopted in modern legislation", or discriminatory, in fiscal matters, against foreigners or foreign corporations.

Clauses 2-4 of the Annex, while providing for obtaining the consent of the interested powers to the proposed judicial organisation, ended with a threat of more drastic action:

2) As a first step, the Egyptian Government will approach the capitulatory powers as soon as possible with a view to a) the removal of all restrictions on the application of Egyptian legislation to foreigners and b) the institution of a transitional regime for the Mixed Tribunals as provided in para. 1 (ii) above.

3) His Majesty's Government in the United Kingdom as the government of capitulatory power and as an ally of Egypt, is in no way opposed to the arrangements referred to in the preceding paragraph and will collaborate actively with the Egyptian Government

in giving effect to them by using all its influence with the powers exercising capitulatory rights in Egypt.

4) It is understood that, in the event of its being found impossible to bring into effect the arrangements referred to in para. 2, the Egyptian Government will retain its full rights unimpaired with regard to the capitulatory regime, including the Mixed Tribunals. In accordance with these provisions, the Egyptian Government on 16 January 1937 invited the capitulatory powers to a conference which was to meet at Montreux on 12 April 1937.

Representatives were sent to the conference by the Government of Egypt and by the 12 capitulatory powers,¹²⁸ together with the Union of South Africa and the Irish Free State.

The Egyptian Government's proposals were contained in a second circular which was handed to the legations in Cairo on 3 February 1937.¹²⁹ The claims of the Egyptian Government, as elucidated in the memorandum, may be summarized as follows:

- i- The immediate transfer to the national courts of all jurisdiction which was then exercised by the Mixed Courts.
- ii- The maintenance of the Mixed Courts only for a transitory period under decrees of foreign judges.

The memorandum demanded that a clear agreement must be reached on the definition of the term 'foreigners'. The circular made it clear that the term included the citizens, but not the 'subjects' or the 'proteges' of the 12 capitulatory powers. It should be emphasized, however, that this definition is appreciably narrower than the meaning customarily given to the word foreigners by the Charter of the Mixed Courts and its judicial practice.

The second demand made in the memorandum, and not previously warranted by the 1936 Treaty, was the abolition of the doctrine of "mixed interests" under which the Mixed Courts had enormously extended their jurisdiction beyond the letter of their charter. The memorandum also sought to introduce certain modifications into the composition of the courts themselves. It suggested that, as

vacancies occurred on the Mixed bench during the transitory period, they should be filled by Egyptians, irrespective of the nationality of the deceased or retiring judge.

The issues presented by the Egyptian circular caused a diversity of opinion, thus giving rise to prolonged discussions at the conference before which these demands were put. The Egyptian delegation was led by Mustafa al-Nahhas Pasha, the Egyptian Prime Minister. He took to the conference the Egyptian demands, in the shape of drafts for a convention abolishing the capitulations, and for a revised *Reglement d'Organisation Judiciare* governing the conditions under which the Mixed Tribunals were to operate during the interim period.¹³⁰

At the conference the question of the abolition of capitulations raised no divergence of opinion among the delegates of the capitulatory powers and the Egyptian demand was accepted as it had been formulated by Egypt.¹³¹ Although considerable heated discussion surrounded the Egyptian proposals which proposed to modify the then existing system of the Mixed Tribunals, after protracted negotiations, an agreement was reached on 8 May 1937, and signed by all delegates subject only to ratification by ordinary procedure.¹³²

The abolition of the capitulations was thus accomplished. Art. 1 of the convention provided: "The High Contracting Parties declare that they agree to the complete abolition in all respects of capitulations in Egypt". The status of foreigners in Egypt after the abrogation of the capitulations was expressly governed by Art. 2(1) of the convention: "Subject to the application of the principles of international law, foreigners shall be subject to Egyptian legislation in criminal, civil, commercial, administrative, fiscal and other matters". Egypt had recovered her sovereignty and the legislative attribution of the Mixed jurisdiction was to disappear. The legislation to which foreigners would be subject would not be inconsistent with the principles generally adopted in modern legislation and would not entail any

discrimination against foreigners or against corporations registered under Egyptian law in which foreigners had substantial interests.¹³³

It was the duration of the transitional period before the Mixed Courts should cease that caused controversy.¹³⁴ It should be recalled that the Anglo-Egyptian Treaty of 1936 provided for the operation of the Mixed Courts for a "reasonable but not unduly prolonged period". The convention in its Art. 3 accepted the Egyptian demand in the following words:

The Mixed Courts of Appeal and the Mixed Tribunals now existing shall be maintained until the 17th October, 1949. As from the 15th October, 1937, they shall be governed by an Egyptian law establishing the *Reglement d'Organisation Judiciare*

On the date mentioned in paragraph 1 above, all cases pending before the Mixed Tribunals shall be remitted, at the state which they have then reached and without involving the parties in the payment of any fees, to the national tribunals to be continued therein until they are finally disposed of.

The period from the 15th October 1937 to the 14th October 1949, shall be known as 'the transitional period'.

From the beginning of that transition period, vacancies on the tribunals are to be filled with Egyptian judges, provided that foreign representation shall never fall below one-third. 135

Although some Egyptian political parties pressed for the immediate abolition of the Mixed Courts,¹³⁶ it was realised that an immediate abolition of the Mixed Courts could have effected a veritable exodus of capital to the detriment of the country. On the other hand, there was a practical difficulty as, for administrative reasons affecting many of the parties, the courts could only be abolished after some transitory period during which the remittance to new judicial organizations could be effected. Moreover, the period was believed sufficient to enable Egyptian judges to fully familiarise themselves with European legal systems.

Detailed rules were set up by the new *Reglement d'Organisation Judiciare* concerning the operation of the Mixed Courts during the interim period. For the purposes of the Mixed Courts' jurisdiction, the word foreigner was defined in Art. 25 of the new *Reglement* to include "the nationals of the High Contracting Parties to the Montreux Convention and the nationals of any other state which may

be added by Egyptian decree".¹³⁷ By another paragraph of the same Article, ressortissants of the mandated territories of Syria, the Lebanon, Palestine and Transjordan were specifically excluded from the jurisdiction of the Mixed Courts.

The jurisdiction of the courts in civil and commercial matters had been redefined by Art. 26. Unlike the old Reglement, the new charter extended the competence of the Mixed Courts to cases of foreign personal status and stated that the Mixed Courts should apply to such cases the national law of the parties.¹³⁸

The theory of mixed interests was abolished altogether by Art. 33 of the new Reglement, but such abolition was made subject to a number of exceptions:

1) Egyptian companies already formed, in which there are substantial foreign interests, shall be considered 'foreigners' for the purpose of jurisdiction, unless otherwise provided by their statutes. (Art. 34).

2) With regard to bankruptcy cases, the old extensive practice of recognizing the Mixed Courts' competence was also reaffirmed by the new system.¹³⁹

3) With regard to foreign mortgages, the proposal of the Egyptian Government had been accepted. If there was a mortgage in favour of foreigners on real property by whomsoever possessed or owned, the Mixed Courts were made competent to pronounce upon the validity of the mortgage and on all consequences thereof, including the judicial sale of property and the distribution of proceeds. (Art. 36).

The convention was signed at Montreux on 8 May 1937,¹⁴⁰ and came into force in 1938.¹⁴¹ Egypt itself ratified the convention on 19 July 1937 with only two dissenters.¹⁴²

The Mixed Courts closed at midnight on 14 October 1949, after three-quarters of a century of judicial work.¹⁴³ An entirely new Civil Code was introduced in the same year,¹⁴⁴ the preparation of which was entrusted to a distinguished Egyptian jurist, Abel Razaq al-Sanhuri.¹⁴⁵ The new code also invited the development of a new and distinct jurisprudence, namely the Islamic Law. As mentioned above, Art. 3 of the Montreux Convention provided that, on 15 October 1949, all cases pending before the Mixed Courts should be remitted, at the stage they had then reached, to the National Tribunals, to be continued therein until such cases were finally disposed of by the National Courts,¹⁴⁶ which were thus established to administer the new Civil Code,¹⁴⁷ and to absorb the Mixed Courts both in form and functions. In this way, the new courts were necessarily the successors of the Mixed Courts.

Other legislation required to give effect to the Montreux Convention, particularly in relation to the end of the transition period, were duly enacted. Of these, the most obviously necessary enactment was Law No. 115 of 1948 abolishing the Mixed Courts and Consular Courts and remitting cases pending before them at the end of the transition period to the National Courts.

By Law No. 64 of 1949 a new Court of Appeal was established at Mansourah so that from 15 October 1949 there would be, together with those already existing in Cairo, Alexandria and Assiut, a Court of Appeal in the national system. Another enactment was promulgated in 1949 (Law No. 79 of 1949), in which provision was made for the transfer to the new national system from 15 October 1949 of judges and officials of the Mixed Courts of Egyptian nationality, without prejudice to any existing salary right superior to those enjoyed by the judges and officials of the National Courts.

V. THE NATIONAL COURTS AND JURISDICTIONAL IMMUNITIES

1. The Confirmation of the Restrictive Trend adopted by the Mixed Courts

It was thought that the promulgation of the new Egyptian Civil Code of 1949 would immediately destroy the value of judicial precedents which had been built up by the Mixed Courts.¹⁴⁸ Yet as far as the question of state immunity is concerned, frequent resort to the rich jurisprudence of the Mixed Courts is observable in the practice of the National Courts. As a matter of fact, it has been the tendency of the National Courts to adhere consistently to the trend firmly established by the Mixed Courts on the subject. Furthermore, neither the new Civil Code nor any other national legislation has been enacted to govern cases involving issues of state immunity. The influence of the Mixed Courts has thus been enduring. To this has been added the continued presence on the national bench or the bar of a number of able Egyptian lawyers who had received their early training in the Mixed Courts.¹⁴⁹

The first judgement to be rendered by the National Courts in this field was one in which the People's Republic of Yugoslavia was involved,¹⁵⁰ delivered by the Civil Tribunal of Alexandria on 12 May 1951. It was an application by the Federated Republic of Yugoslavia asking that an order of attachment by the District Court of Alexandria be discharged. The order was on the basis of an application made by the Kafr El-Zayat Company authorizing it to take certain measures of sequestration on goods alleged to be the property of the Yugoslav Republic. The District Courts found that a contract had been made at Belgrade between the Kafr El-Zayat Company and the Yugoslav firm of Hempro for the purchase of chemical products, namely 750 tons of carbonate of soda at £12 a ton; only 150 tons of the product had been delivered, and the company was therefore obliged to buy the balance elsewhere at a total price of £6,500. The Yugoslav firm had since been nationalized, and now formed part of the Federated People's Republic of Yugoslavia. The

company claimed that the Yugoslav Republic was responsible to the same extent as Hempro. These contentions were accepted by the District judge and judgement thereon was entered against the Yugoslav Republic authorizing the company to sequester certain goods of the Republic which were held by the Egyptian customs authorities and some banks. In an appeal to the Civil Tribunal, the Yugoslav Republic claimed that the order should be set aside inter alia, on the grounds that a) foreign governments are immune from the jurisdiction of local tribunals; b) in view of its constitution and the peculiar social organization of the Yugoslav Republic, the exercise of foreign commerce is exclusively under the control of the government, and therefore its commercial acts cannot be regarded as acts performed jure privatorum. Although the order was set aside on other grounds to be examined later, the court refused to accept the contention that in this particular case the commercial activities performed by the Yugoslav Republic constituted an act of sovereignty. The court stated that:

It is necessary to distinguish acts of sovereignty which foreign governments and their representatives performed in the exercise of their state functions, and which are considered, by their very nature, as acts of sovereignty. Disputes which result from any such acts are not subject to the jurisdiction of the national courts. They must be resolved by methods which are in conformity with the rules laid down by public international law such as diplomatic channel, arbitration or international conferences. As regards any dispute which results from an act done by a foreign state under the same conditions as a private individual, that is subject to the jurisdiction of the national courts. 151

The court, however, had left open the question whether, in the circumstances of the case, the collective nature of the organization of state economy undertaking the exercise of activities aiming at producing or exchanging goods, would thus widen the limits of the competence of the state and therefore necessarily imply exercise of sovereignty. The court observed that the international practice and doctrine had moved along the restrictive theory of immunity, a result which had been achieved by making the distinction between public and private acts. That distinction, in the court's view:

.... has limited immunity to disputes arising from the performance of acts of sovereignty, that is to say, acts which cannot, by their very nature, be performed except by state and

are considered as acts of public authority and related to public interests.

By implication, acts of a private nature appear to be excluded from state immunity, even if done by the state through the exercise of public power.

Indeed, the Yugoslav argument in this case is a part of the general theory propounded by the socialist countries regarding state immunity, namely: a sovereign state cannot have two different personalities. According to this thesis, a state cannot act otherwise than a sovereign entity, and all functions undertaken by the state are governmental and official.¹⁵² This theory has attracted some support among Western jurists.¹⁵³

Whatever the merits of this theory, the facts upon which it is based are not borne out by the practice of the majority of states which tend to differentiate between the public and private activities of states. There seems to be no solution to this unavoidable difference since it involves ideological conceptions which are difficult to implement in practice.

The decision of the Civil Tribunal of Alexandria implicitly rejected this dichotomy and preferred the distinction between sovereign and private acts as this was in accord with the increasing international practice. Perhaps the most interesting point in the judgement is that, even in the case of sovereign acts which are generally regarded as attracting immunity, the court does not absolutely absolve the foreign government from liability, for it suggests that disputes arising from such acts are still to be settled by amicable methods according to public international law. In other words, absolute immunity in the case of public acts is not wholly absolute since it is subject to another 'modifier', that is to say, the defendant state would still be answerable to the complaint being made against it.

2. Jurisdictional Immunities of Foreign States are a Matter of Public Policy

An interesting trend has been initiated by the current case-law of the National Courts where jurisdictional immunity was held to constitute a question of ordre publique, which is for the court to determine and there is no presumption of waiver in such a case. This view was reflected in the decision of the District Court in Cairo of 1964.¹⁵⁴ The suit was brought by the plaintiff, a former mechanical engineer, against his employer Saudia, the Saudi Arabia Airline. The court found as a fact that the claim rested on a contract of employment with the defendant, which contract was issued in accordance with a Royal Decree passed by the Saudi Government. As stipulated in Art. 13 of the contract: "any dispute concerning the application or the interpretation of the contract shall be subject to the jurisdiction of the Saudi courts". The defendant neither entered appearance nor raised the question of immunity in any form. The court held that it had no jurisdiction for the following reasons:

1) That it is well established in international law that the jurisdiction of the local courts will be determined according to: a) the nationality, residence or domicile of the defendant; b) the place where the contract is to be performed; and c) by agreements between the parties.

2) Both doctrine and practice agreed that a foreign state is exempted from the jurisdiction of the territorial state. Such exemption ensues from the principle of sovereign equality of states, and thus the Egyptian courts have no right to review acts and obligations of foreign governments.

3) The incompetence of the Egyptian courts in suits brought against foreign states is a matter of public policy, and therefore the court may announce its incompetence of its own motion, even if such lack of jurisdiction was not directly pleaded by the foreign state, or even if such a foreign state failed to enter an appearance

before the court. Such non-appearance on the part of the defendant state does not constitute an effective waiver of immunity.

4) Since the parties had expressly agreed that for the settlement of any dispute arising under the contract, recourse was to be had to the ordinary Saudi courts, the court held that this choice of jurisdiction was binding between the parties, and as such, should be respected. It, therefore, declared itself without jurisdiction.

It is clear from this judgement that a more unqualified immunity was adopted by the court. It is surprising that no mention whatsoever was made by the court to the distinction between public and private acts, a distinction which was firmly established by the Mixed Courts and endorsed by the National Courts in the Republic of Yugoslavia case. Further, the judgement raises the point of interaction between immunity and jurisdiction. The jurisdiction of the courts, according to the judgement, is a matter of public policy, so that a judge in a case automatically has to raise the question of immunity without waiting for the state itself to be able to prove that it enjoys immunity. Under these circumstances, immunity need not be invoked expressly. To this extent the concept of public policy was indirectly used to justify the existence of state immunity. Whatever the justifications on which the court based its decision, its judgement stands as an odd instance in the jurisprudence of the Egyptian courts on the subject and runs counter to an established trend of those courts. Admittedly, that part of the judgement which tends to base its jurisdiction on the choice of the parties and other rules of private international law is entirely satisfactory, although even in the absence of such choice, the jurisdiction of the court could still be frustrated by the notion of public policy. It was in the light of some of these observations that the appeal to the Cairo Court of Appeal was successful.

3. Jurisdictional Immunities of States Apply Only to Acts of Public Law

The restricted theory of immunity was reaffirmed by the Cairo Court of Appeal in its decision of 4 May 1966.¹⁵⁵ The decision of the court was a result of an appeal against the decision of the District Court of Cairo in the aforementioned case. The appellant alleged that the rules governing judicial competence of the territorial state is a matter of public policy and it is not permissible to contract outside it, and if the parties agreed to refer any dispute under the contract to the Saudi courts, that was contrary to public policy and, therefore, such choice of jurisdiction should not be recognized. The appellant also claimed that the Saudi Arabia Airline is a public corporation undertaking commercial activities and rendering services to the public at large, and thus subject to the jurisdiction of the Egyptian courts.

The Court of Appeal made the principle of territorial sovereignty the point of departure by observing that state authority in judicial matters is generally territorial in the sense that every subject, person or property physically within or connected with the territory of the state, is subject to its territorial jurisdiction, but the state competence is not exclusive or absolute since there are cases in which this competence may be relaxed, such as suits brought against heads of states, diplomatic representatives of foreign states, or international organizations.

As to the immunity enjoyed by the foreign state from this territorial supremacy, the court went on to state that:

such immunity is not absolute, in the sense that, this immunity cannot apply in the case of a foreign state which chooses to engage in business transactions with private persons, but only where it is apparent that the state has acted as a subject of international law, exercising its public powers. 156

The court, in following the restrictive view of immunity, found it necessary to examine the nature of the dispute in applying the distinction. It took the view that the contract of employment was entered into between the Saudi Government and the appellant.

Therefore, the contractual relation was subject to the public and not private law. The court also seemed to be influenced to a measurable extent by the fact that the Saudi Government terminated the contract of the appellant for political reasons, a fact which was not contested by the latter, and consequently declared itself incompetent to review an act of the Saudi Government undertaken by that Government in its sovereign capacity.

The significance of the decision of the Court of Appeal lies in the fact that the distinction between public and private acts was judicially endorsed and in this way it superseded the District Court's decision. However, the characterization of the contract of employment as a political act of state is certainly open to question. Instead of basing its decision on the choice of jurisdiction clause, the court went even further and investigated the question of competence by reference to exterior factors rather than by the express choice of the parties. The first essential point for the determination of exercise or non-exercise of the jurisdiction of the court relates to the existence of the governmental authority of the states. On this point the court arbitrarily assumed that the act of termination of contract results from an act in the exercise of governmental authority of the Saudi Government. There appears to be no valid reason to support the ruling of the court that the legal consequences of the termination of the contract by a commercial airline are necessarily a result of an act done in the exercise of governmental authority.

Consequently the appellant unsuccessfully applied to the Court of Cassation alleging that the contract of employment is a commercial and not a public act of the Saudi state. The appellant cited the Saudi Royal Decree No. 45, passed in 19 February 1963, and establishing the Saudi Arabia Airline as a corporate body which can sue and be sued as a separate legal entity from that of the Saudi Government, and therefore the Saudi Airline was neither an agency of the Saudi Government nor an instrumentality of the Saudi state. The applicant also added that the jurisdiction of the Egyptian courts was based on the trading activity of the company irrespective

of the nature of the contract. The employment of the appellant was merely an accessory to a private law activity consisting of the exploitation in Egypt of a commercial undertaking. The Court of Cassation, in affirming the decision of the appellant Court, ruled that: "the contract was concluded between the [applicant] and the Saudi Government" and that there was nothing to argue about as far as these express words were concerned. As to the argument about the separate legal personality of the company, the court held that this argument is a fact which should have been raised before the court in the first instance, for relying on a foreign law, namely, the Saudi Royal Decree, was no more than a fact which would have to be proved before the District Court, a thing which the applicant had failed to do. Accordingly, the court held that the claim of the appellant constituted a new cause of action, raised for the first time, and was thus inadmissible before the Court of Cassation which was essentially a court of law and not of fact.

These decisions seem to run contrary to the general trend of restricted immunity prevalent in the Egyptian courts for nearly a century in regard to private activities of foreign states as amenable to local jurisdiction. Although that part of the decision of the Court of Appeal which differentiates between public and private acts is essentially correct, there are a number of debatable points elsewhere in these judgements. The first point of interest relates to the determination of jurisdiction. If the distinction between private and public acts is accepted by the appellant court, one would expect the court to determine the existence of jurisdiction on that basis, namely the involvement of the governmental authority of the state, in the exercise of which the cause of action has arisen. To rule that the conclusion of the contract of employment by an airline with a civilian engineer is a public act of a foreign state is to adduce a proposition which cannot be easily supported by doctrine or practice. The nature of the services performed by the employee form an important element. Depending on whether those services are official or not, the content of state immunity differs. Perhaps the finest point about the proceeding is that the underlying reason for labour legislation is

the protection of individuals, which constitutes an important element of social development in today's world. If a rule of immunity is permitted to apply in these areas, private individuals may be left remediless in their efforts to pursue what they regard as valid claims against foreign state employers.

4. Ex-Sovereign or Head of State Enjoys No Jurisdictional immunities from Local Courts

It has been firmly established in international practice that a foreign sovereign is not subject to the jurisdiction of the courts of another state and is not liable to personal arrest or detention within the territory of another state. These immunities of foreign states have often been regarded as part of the general jurisdictional immunities of states since the majority of writers have treated the immunities of foreign heads of states together with those of foreign states. The same tendency is prevalent in treaty practice.¹⁵⁷ Although judicial decisions are not unanimous as to the limits of this exemption, the general rule of immunity seems to be fairly settled. Whereas earlier cases frequently concerned immunities of the sovereign head of state, some recent cases have been reported concerning immunities of heads of states who were no longer sovereigns.

Traces of issues of immunities of ex-sovereigns in current Egyptian case-law can be found in the judgement of Cairo District Court of 1971.¹⁵⁸ The litigation involved a suit by an Egyptian national brought against a Saudi Minister of State in his capacity as receiver of the inheritance of the late King Saud ibn Abdul Aziz Al-Saud. The respondent moved to dismiss the suit on the ground that the Egyptian courts were incompetent because Art. 29 of the Egyptian code of civil procedure specified certain actions which may be brought against the foreigner, resident or domiciled in Egypt, none of which was satisfied in that petition.

Although the issue of jurisdictional immunity was not raised by the respondent, the court took the view that the first and primary question to be examined was evidently the competence of the court. In order to deal with this issue, the court decided to investigate the nature of the claim under consideration. It stated that both doctrine and practice recognized a contract of debt as an admissible document, if duly signed by the debtor, no matter whether he is a sovereign or a private individual, and the same was true as far as the satisfaction of the debt was concerned. The court went on to say that:

Although international custom confers upon foreign sovereigns a broad exemption from jurisdiction of the territorial authority, this immunity does not result in exemption from application of substantive law, but only from the jurisdiction of the territorial courts.

In the view of the District Court, jurisdictional immunities cover the foreign sovereign while he is still reigning, but cannot be claimed by a deposed sovereign or a former head of state because he is no longer serving the general interests of the same society in the intercourse of its members. Therefore neither he nor his agent can justify his exemption from the competence of the court by relying on this extinguished immunity. Accordingly, the court held that the plaintiff would have to prove that the contract of debt was duly signed by the ex-king. Such was not the case, however, as sufficiently evidenced by the facts. Hence as the debt was not signed by the late king, he was not legally obliged to repay it. Although such debt may be claimed from his successors, since the latter are foreigners who have no residence or domicile in Egypt, and since the suit did not involve a property situated in the forum, nor did it arise out of obligations which should have been performed therein, applying Art. 29 of the Code of Civil Procedure, the plaintiff was not entitled to have this action heard before an Egyptian Court, and therefore the court was not competent to take cognizance of the case.

Two comments of a fairly general nature may be made. The first is that the case was brought in 1970 after the dethronement of

King Saud and even after his death. The court did not discuss whether the debt had been contracted by the late king while he was still reigning or after his deposition. The desirability of this point being examined by the court lies in the fact that, if the extent to which a foreign head of state is exempted from local jurisdiction is a controversial issue and much less settled in both doctrine and practice, this immunity seems to be totally non-existent if the foreign head was deposed either at the time of the dispute or at the time of bringing the action. The non-immunity could be said to have a retroactive effect in this case, in the sense that suits may be brought against him before foreign courts in respect of any action done in his capacity as sovereign with the exception of acts done by him in the exercise of his public authority.

Secondly, the court has clearly pointed out that state immunity is jurisdictional in nature, in the sense that immunities do not result in exemption from the application of the substantive law of the territorial jurisdiction before whose authorities proceedings have been brought and state immunities invoked. This absence of legal and substantive immunity from local law is clearly manifested upon a waiver of immunity or voluntary submission to the local jurisdiction. On the occurrence of such a waiver or submission, all the substantive and procedural law of the forum will resume their application. This view of non-existence of legal exemption, if carried to its logical consequence, would mean that, if an action was brought against a foreign sovereign after his deposition, he was amenable to the local jurisdiction in respect of his private and non-official acts, including those performed during his reign. On this particular point, the judgement seems entirely satisfactory.

5. Immunity From Execution

Although the decisions of the National Courts offer little in the way of precedents in the execution field, it may be mentioned that the only reported instance in which immunity from execution was

directly raised was the case involving the Republic of Yugoslavia, discussed above. The district judge authorised the company to sequester certain goods alleged to belong to the Yugoslav Republic and which were held by the Egyptian customs authorities, Barclays Bank and the Egyptian National Bank. Before the Commercial Tribunal of Alexandria, Yugoslavia claimed that the order be set aside, especially in as much as it permitted the sequestration of goods in the hands of third parties. As already mentioned, the court assumed jurisdiction because of the commercial nature of the transaction. As far as the order of attachment was concerned, the court took the view that, according to Art. 547 of the Egyptian Code of Procedure,¹⁵⁹ sequestration of goods is regarded as a purely provisional measure, irrespective of the nature of the debt. However, the court accepted the Yugoslav claim and ruled that the judgement obtained against the Yugoslav state could not be levied on its property. The court observed that such attachment, according to the majority of writers in international law, was not allowed, whether it be purely as a provisional measure or with the object of preventing that government from taking the goods out of the jurisdiction. It matters not whether it acts in a private or public capacity. The court seemed to be influenced by the theory that the judgment creditor of a foreign state should not be permitted to interfere with any sovereign function of the state by sequestering its property whereby such functions were exercised. For these reasons, the court set aside the order of the lower tribunal.

It is remarkable how in this decision immunity has gradually shifted from procedure to substantive law. It is quite a jump for any one, including the court, which sought to touch ground half-way, to accept the view that jurisdictional immunities however liable to qualification they may be, will always be of an absolute nature where property rights are in dispute. It is true that jurisdictional immunities differ from the immunity from execution in nature, stage and the standard by which each form of immunity is judged, but it does not seem logical to suppose that immunity from execution is ipso facto absolute whenever property rights are

involved. Furthermore, the court, without considering the nature of the property against which execution was sought, presupposed that state functions would be hampered if its property was attached. There might be some justification if the property in question was identified as being used for diplomatic functions or other governmental purposes such as military service, but the same is not necessarily true in regard to property which the foreign state owned or in which it had an interest and is purely designed for a non-governmental function. Hence it was not enough to assert that immunity from execution was necessary for the exercise of state functions in all circumstances. Immunity belongs to the state and not to the property and, if the state concerned was made subject to the jurisdiction of the local courts in respect of its commercial activities, there appears to be no reason why the same jurisdiction should not be exercised in relation to property designed for commercial purposes.

The above examination of the National Courts' case-law in respect of state immunity allows the following findings:

1) Although the Mixed Courts ceased to function in 1949, and since a new Egyptian Code has been promulgated in substitution for the Mixed Code which these courts used to apply, there is still no provision in that Code nor any other text in Egyptian law which expressly designates the competent court before which an action against a foreign state may be instituted, nor is there any definite text upon which to rely in determining their competence concerning suits against foreign states, although the National Courts have obviously been influenced by the prevailing practice of the Mixed Courts with regard to state immunity. In the majority of cases, the jurisdiction of the court is based on the distinction between public and private acts of the foreign states. The latter are regarded as essentially within the jurisdiction of the courts, whereas the former are not.

2) The question of determination of competence is made further complex by the view that jurisdictional immunities are a matter of

public policy and, as such, can be determined by the court of its own motion, even if it is not expressly invoked by the foreign state. The impact of this judicial view tends to move the courts towards a more absolute immunity, since the issue of state immunity would automatically have ousted the jurisdiction of the court without waiting for the state itself to be able to prove that it enjoyed such immunity. However, this view was reflected in only one single decision and did not receive further confirmation.

3) The case-law of the National Courts has also confirmed that no foreign state can be said to be immune from the laws of the territorial state applicable within that state territory, but from the jurisdiction of the territorial state which was considered to be the basic norm.

4) The judicial decisions of the National Courts do not, as yet, provide a clear ruling on the issue of immunity from execution. The single case decided on this point offers no satisfactory solution. It is certainly difficult to deduce from that judgement a clear-cut evolution in Egyptian case-law towards a restrictive approach to immunity from execution. On the contrary, it may be regarded as a precedent of absolute immunity from execution, contrary to the established practice of the Mixed Courts.

At any rate, the cases show a clear willingness on the part of the Egyptian courts to interfere and assume jurisdiction and its jurisprudence continued to develop positively in the protection of private litigants, despite the fact that some of the cases involved a neighbouring Arab state with good political relations with Egypt.

References - Chapter 3

1. Nadav Safran, Egypt in Search of Political Community (Cambridge, Mass., 1961), p.28. For a description of Egyptian society at the end of the 18th century, see also Gibb and Bowen, Islamic Society and the West (London, 1950), Vol. I, Introduction, Parts I-II.
2. Convention (London) for the Pacification of the Levant, Great Britain, Prussia and Russia with the Ottoman Empire, 15 July-17 September 1840; text in GBPP, XXIX (1841), 691-8.
3. Firmans were contractual charters between the Sublim Porte and Egyptian governors. The ruler to whom the firman was granted was bound to observe its terms, and if he failed to so, the firman would be renounced. The Memorandum of the Convention of London states: "If Mohammad Ali or any of his successors should infringe on the conditions which the hereditary government of Egypt has conferred on him, he may be deprived of his office". In Moghul Empire's practice, the word firman was used to denote unilateral imperial concessions granted to foreign powers relating to free trade, customs duties, shipwreck and others, see. See Alexandrowicz, An Introduction to the History of the Law of Nations in the East Indies (Oxford: Clarendon Press, 1967), pp.198-9.
4. GBPP, 78 (1879), "Firmans granted by the Sultans to the Viceroys of Egypt, 1841-73", Egypt No. 4 (1879), C.2395, 36-9. This Parliamentary paper gives the texts of the firmans from 1841 to 1873, together with the British diplomatic correspondence regarding them. Though in the form of unilateral grants, these firmans were: "international instruments being concerted among the powers chiefly interested and then imposed by them upon a more or less recalcitrant Suzerian". See McIlwraith, "The Declaration of a Protectorate in Egypt and its Legal Effects", J.C.L. & I.L., new series, 17 (1917), 249-50.
5. Ibid.
6. However, it should be recalled that many of the Ottoman laws were found to be unsuitable for Egypt and thus were not applied. Examples are: The Ottoman Land Code 1839; Ottoman Penal Code 1840; The Ottoman Civil Code (Mejallat al. Ahkam al'Adliyya) 1870-1877. See Mark S.W. Hoyle, "The Origin of the Mixed Courts of Egypt", ALQ, I, Part 2 (Feb. 1986), 222.
7. Text in W.M. Malloy, Treaties, II, p.1319.
8. See GBPP, LXXXI (1913), Cd. 6875, Egypt No. 2, p.3.
9. Various writers cite the Treaty with France of 1535 as the first treaty which formed the basis of the regime under which other powers later obtained analogous privileges. These are:

- the Treaty with Great Britain (1553) and the Treaty of June 1580, text in Richard Hakluyt, The Principal Negotiations Voyages Traffiques and Discoveries of The English Nation, 5 (Glasgow, 1904), 183-9; and the Treaty of September 1675, text in Edward Hertslet, Treaties and Charters between Turkey and Foreign Powers, 1535-1855 (London, 1855), pp.247-66; Belgium (1833), Denmark (1756), France (1740), Greece (1855), Italy (1861), Holland (1860), Sweden (1737), Portugal (1843), Spain (1872), America (1830), Russia (1783), Germany (1761), Austria-Hungary (1718), see BYBIL, 18 (1937), 79, and M. Khadduri and H. Liebesny (eds.), Law in the Middle East (Washington, 1955), Vol. I, Chap. 13.
10. The subject has been thoroughly examined by, among others, N. Sousa, The Capitulatory Regime in Turkey (Baltimore, 1933) and Brown, Foreigners in Turkey (London, 1924).
 11. See Hoyle, op. cit., p.221.
 12. Ibid.
 13. The Hatti Sharif Oulhane of 3 November 1839 promised fundamental changes in the conduct of the courts, the assessment and collection of taxes, and the terms of military service for Ottoman subjects. This eventually culminated in the promulgation of a constitution in 1876.
 14. Ziadeh, Property Law in the Arab World (London: Graham and Trotman, 1979), p.6.
 15. See McIlwraith, op. cit., pp.238 et seq.
 16. GBPP, 78 (1879) [C.2395], 1-2.
 17. This was evident by the fact that, at the time of the establishment of the Mixed Courts, there were 17 consular courts, each administering the law and referring appeals to the courts of its country of origin. The picture was mockingly portrayed by Norman Bentwich when he said: "If Macedonia has been described as a Macedoine of nationalities; Egypt might as justly be described as a Macedoine of laws and jurisdiction". LQR, 28 (1912), 372-7, at 372.
 18. GBPP, Egypt No. 6 (1883, 74); see also Nubar Pasha and Maunowry, Judicial Organization in Egypt and Its Reform (London, 1868), 18-28.
 19. See the Report of the British Consul-General to the Earl of Derby, received 8 August 1878, and Colonel Stanton's letter of 4 March 1878, Sessional Papers, Egypt No. 2 (1879), Sec. 86, pp.77-8.
 20. Alfred Milner, England in Egypt (London: Edward Arnold 1892), new 5th ed., pp.45-53.

21. This has seriously affected the inner life of the country to the extent that the petty commerce, the village shopkeeping and money lending, and all business of that class was in the hands of Greeks and Syrian Christians, to whom the easy uncommercial Egyptian Arabs had surrendered it. See George Campbell, "An Inside View of Egypt", The Fortnightly Review, 23, January 1 to June 1 (1878), new series, 25-47, at 26.
22. See M. Hoyle, op. cit., p.228; de Guerville, New Egypt (London, Heinemann, 1906), p.89.
23. Ibid., p.226.
24. Quoted by J.Y. Brinton, The Mixed Courts of Egypt (Yale: University Press, 1968), Rev. ed., pp.8-9. The complications arising from the multiplicity of consular jurisdiction resulted in a state of things which was in the least degree deplorable. Lord Dufferin pronounced them to be a 'mockery'; see his General Report, GBPP, Egypt No. 6 (1983), 50.
25. See Hoyle, op. cit., p.229.
26. See GBPP, 78 (1879), 625-7.
27. See Hoyle, op. cit., p.230.
28. For the work of the whole machinery, see Brinton, The Mixed Courts of Egypt, op. cit., and Mark S. Hoyle, "The Structure and Laws of the Mixed Courts of Egypt", ALQ, I, Part 3 (May, 1986), 327-45.
29. See Brinton, op. cit., p.45.
30. The gradual transfer of the consular jurisdiction to the Mixed Courts was once suggested "but viewed by Egyptians as it would count as nothing against the creation of posts to be occupied by foreigners. See Lord Lloyd, Egypt Since Cromer (London: Macmillan & Co. Ltd., 1934), Vol. II, pp.299-301.
31. See Erwin Loewenfield, "The Mixed Courts of Egypt as a Part of the Capitulations after the Treaty of Montreux", Trans.Gro. Soc., 34 (1940), 83-123, at pp.88-89.
32. It gave the courts jurisdiction "in the case of controversies between natives and foreigners and between foreigners of different nationalities"; see 5 MCC.
33. It has been argued that, as far as the position before the First World War was concerned, the Turks themselves could not be regarded as foreigners. As Egypt was legally a part of the Ottoman Empire, as such they could not be regarded as foreigners within a country that was their own. See Hoyle, "The Mixed Courts of Egypt 1875-1885", ALQ (1985), 446.

34. De Carmela Soussa and Other v. Administratif Generale de Wagfs, Summary Tribunal of Mansoura, 10 May 1911, OTM 1, p.119.
35. See Rizgalla v. Zahara, May 4, 1926, Gaz.Trib.Mix., XVIII, No. 12.
36. GBPP (1923), Treaty Series No. 16, Cmd. 1929.
37. Gaz.Trib.Mix., XVII, No. 11.
38. Stavri Magripili v. Suez Canal Company, Mixed Court of Appeal, 26 May 1880, ROV, 362.
39. See, e.g., Credit Foncier v. Daud Pasha Yakan, Mixed Court of Appeal, 31 Jan. 1883; and Chamaki v. Faillite Omar Zasuari, Alexandria District Court, 31 Mar. 1881.
40. Abdalla Nassir v. Daira Sanich of the Khedieve, Mixed Courts of Appeal, 14 Mar. 1888, ROV, XII, 112.
41. For the statistics published by the Egyptian Government relating to all corporations having their principal seat of activity in Egypt in 1928, see Brinton, The Mixed Courts, op. cit., p.65 n. It is clear that most of the capital was foreign.
42. The system is fully explained in Brinton's Mixed Courts, op. cit., Chapter 8.
43. These judges belonged to the following capitulatory powers: Germany, Austro-Hungary, France, Belgium, Denmark, Spain, Great Britain, Italy, Holland, Portugal, Russia, Sweden, Norway and the USA.
44. Art. 34, CMC.
45. See W.E. Grigsby, "The Mixed Courts of Egypt", LQR, 12 (1896), 252, at 256.
46. Sir Malcolm McIlwraith, the former judicial advisor to the Egyptian Government, cited in Brinton, op. cit., p.87.
47. However, it was argued that the codes were drafted in French because French was the language that most people in Egypt spoke. See Hoyle, "The Structure and Laws of the Mixed Courts of Egypt", ALQ, 2, Part 3 (May, 1986), 327-45, at 330. The same writer also refused to accept the assumption that these codes were simply paraphrased French codes, yet he concludes that: "The initial format was that of a civil law as against a common law system"; see ibid., 332.
48. See Grigsby, op. cit., p.173.
49. H. Goudy, "Administration of Justice in Egypt", LQR, 23 (1907), 409-19, at 413.

50. On his accession in 1863, he found Egypt with a national debt of three millions and, on his disposition in 1879, the debt stood at over £90 millions.
51. M. Hoyle, "The Mixed Courts of Egypt 1875-1885", ALQ, I, Part 4 (August 1986), 436-51, at 437.
52. See also the corresponding Article of the Old Charter of the Courts, Article 10 Reglement d'Organisation Judiciare.
53. Art. 7, MCC; Art. 11, ROJ.
54. See, e.g., the Affaire Capricas, decided by the Mixed Courts of Appeal on 3 May 1876, and a large number of cases of a similar nature were reported as pending in 1877; see Brinton, op. cit., p.28.
55. Hoyle, op. cit., p.348.
56. See Goldsmith, Keller and Ulcovich Case, (Livre D'or: Alexandria, 1926), p.163.
57. The matter was made the subject of a question put to the Under Secretary of State for Foreign Affairs in the House of Commons. See Hansard's Parliamentary Debates, 3rd series, Vol. CCXXX (21 July 1876), S.1698.
58. According to Judge Brinton: "It may be doubted if in any country of the world the state can be so freely called upon to answer in damages before ordinary courts of law".
59. Hoyle, ALQ, op. cit., 445.
60. Stavri Magripili v. Suez Canal Company, Mixed Court of Alexandria, 26 May 1880, ROV, 362.
61. See, e.g., Credit Foncier v. Daud Pasha Yakan, Mixed Courts of Alexandria, 31 January 1883 and Chamaki v. Faillite Omar Zasuari, Alexandria District Court, 31 March 1881.
62. Abdalla Nassir v. Daira Sanieh of the Khedieve, Mixed Court of Alexandria, ROV, XIII, 112.
63. 11 February 1890, BLJ, II, 225.
64. A public debt commission which was established by a Khedieval Decree on 2 May 1876 to supervise the orderly repayment of Egypt's foreign loans. For the text of the decree see, GBPP, 87 (1876), 71-2.
65. Bencini and Quistas v. Egyptian Government and Government of Sudan, Cairo District Court, 11 April 1910, BLJ (1910), 115.

66. See Agreement establishing a Condominium in The Sudan: Britain and Egypt, BFSP, 91, 19-22.
67. Horis Halcoussi v. Egyptian Government, Mixed Court of Appeal, 3 January 1925, Gaz.Trib.Mix., XV, 80.
68. Karpinsky v. Egyptian Government, 17 January 1925, ibid., XV, 81.
69. See Mark Hoyle, "The Mixed Courts of Egypt 1916-1925", ALQ, 2 (August, 1987), 302-3.
70. John Jones v. Brown Swerts de Landas Wyborgh, Court of Appeal of Alexandria, BLJ, XIII (1900-1901), 334.
71. Dame Marigo Kildani, Veue Haggar v. Fisc. Hellenique, Gaz.Trib.Mix., II (1911-12), 161.
72. See Jasper Y. Brinton, "Suits Against Foreign Sovereigns", AJIL, 25 (1931), 50-62, at 52.
73. See, e.g., UK State Immunity Act 1978, Art. 6(2); US FSIA 1976, Art. 1605(a)(4); The European Convention on State Immunity 1972, Art. 10; Inter-American Draft Convention on State Immunity 1983, Art. 6(b); ILA Draft Convention on State Immunity 1983, Art. III.D. and the ILC draft articles on Jurisdictional Immunities of States and Their Property, draft article 15(b).
74. See, e.g., the Schooner "Exchange" (1812), in US case-law; in UK, the Parlement Belge (1879) and other cases; in France, the Sultan case (1887) and in Germany, the Presidente Pinto case (1901).
75. Hall v. Bengoa, The Mixed Court of Appeal, 24 November, 1920, BLJ (1920-21), p.25; A-D. (1919-22), Case No. 107.
76. W. Stapledons and Sons v. First Lord of Admiralty and others, Gaz.Trib.Mix., XIV (1923-24), 252; A-D. (1923-24), Case No. 74.
77. BLJ, XXXV (1922-23), 542.
78. Commandant P. Saglietto v. Mohamed Tawfil Effendi, Mansourah District Court, Gaz.Trib.Mix., XIV (1924), 251; A-D. (1923-24), 144, Case No. 77.
79. The International Convention for the Unification of Certain Rules Relating to the Immunity of a State-Owned Vessel, LNTS, CLXXVI, 199.
80. Achikian v. Bank of Athens, Cairo District Courts, Gaz.Trib.Mix., XIII (11 Jan. 1923), 134.
81. See Mark Hoyle, "The Mixed Courts of Egypt 1916-1925", ALQ, 2 (1987), 301.

82. Borg C. Caisse Nationale d'Epargne Francaise, Gaz.Trib.Mix., XVII (1926-27), 123; A-D. (1925-26), Case No. 122.
83. Monopole des Tabacs de Turquie, Court of Appeal of Alexandria, 22 June 1929, Gaz.Trib.Mix., XX (1929-1930), 145; A-D. (1929-30), Case No. 79.
84. See, e.g., UK State Immunity Act 1978, Sec. 6 of Singapore's State Immunity Act 1979; sec. 6 of State Immunity Ordinance, 1981, of Pakistan, and Sec. 5 of South African Foreign States Immunities Act 1981. However, it should be recalled that the US FSIA 1976, and Canada's State Immunity Act 1982, have no equivalent provisions regarding contract of employment.
85. See, e.g., 1972 European Convention on State Immunity, Art. 5; Art. 6 of the Inter-American Draft Convention on Jurisdictional Immunities of States, and Draft Art. 13 of the ILC Draft Articles on Jurisdictional Immunities of States and Their Property (adopted at its first reading) 1986.
86. Egyptian Delta Rice Mills Co. v. Comisaria General de Abastecimientos y Transportes de Madrid, Mixed Courts of Alexandria, BLJ, 55 (1942-43), 114 et seq.; A-D. (1943-45), Case No. 27, 103-3.
87. A-D. (1943-45), ibid., at 104.
88. See Sucharitkul, State Immunities, op. cit., p.254.
89. Egyptian Government v. Palestine State Railways Administration, Gaz.Trib.Mix., XV (1924-25), 93; A-D. (1919-42), Suppl. Vol., Case No. 78.
90. Zaki bey Gabra v. R.E. Moore, Esq., Tribunal Refere, Cairo, Gaz.Trib.Mix., XVI (1926-27), 104.
91. See S.E. Echref Badnjevic es Question de Ministre de Yougoslavie en Egypte, C.W.R. Fanner (1947), Clunnet 67-76 (1946-49), pp.113 et seq.; Sucharitkul, op. cit., p.245.
92. The National Navigation Company of Egypt v. Tavoularidis et Cie, Tribunal Refere, Alexandria, Gaz.Trib.Mix., XIX (1928-29), 251.
93. Guebali v. Colonel Mei, Cairo District Court, 22 April 1943, BLJ, LV, 120.
94. See Mark Stanley Wadth Hoyle, "The Mixed Courts of Egypt", unpublished Ph.D. thesis submitted to the SOAS, University of London, September 1983, p.299.
95. MCA, 3 January, 1948.

96. For the text of the agreement, see GBPP (1937), Treaty Series No. 6, Cmd. 5360.
97. Decision of 30 May 1938, BLJ, L (1938), 334.
98. It should be mentioned, however, that this specially reserved jurisdiction was exercised by two different classes of British courts: courts-martial and other courts especially authorized to exercise such jurisdiction. For the competence of these courts, see Jasper Y. Brinton, "Jurisdiction over Members of Allied Forces in Egypt", AJIL, 38 (1944), 375-82.
99. George Triandafilou v. Minstre Public, decided by the Court of Cassation on June 29, 1942, reported in AJIL, 39 (1945), 345.
100. See Archibald King, "Further Development concerning Jurisdiction over Friendly Foreign Armed Forces", AJIL, 40 (1946), 257, at 259.
101. See Mark Hoyle, thesis, op. cit., p.309.
102. Panos Stamatopoulos v. Ministere Public, Mixed Court of Cassation, 23 Nov., 1942, BLJ, LV, 30; AJIL, 39 (1945), 347.
103. Malero Manuel v. Ministere Public, Mixed Court of Cassation, 8 March 1943, BLJ, LV, 125; AJIL, 39 (1945), 349.
104. See Mark Hoyle, op. cit., p.315.
105. 13 December 1943, BLJ, LVII, 52; A-D. (1943-45), Case No. 33.
106. Ministere Public v. Nicholas Korakis, 11 December, A-D. (1943-45), Case No. 34.
107. Referred to by the Court of Cassation in Triandafilous' case, supra.
108. Hanon v. The Egyptian Government and British Admiralty, 2 April 1947, BLJ, 59, 225; A-D. (1947), Case No. 28.
109. A-D. (1947), at p.79.
110. The Mixed Court of Alexandria, 28 March 1949, BLJ, 101 (1949), Part II, 310; A-D., 16 (1949), Case No. 45, 145.
111. See Mark Hoyle, op. cit., p.297.
112. A-D. (1949), at p.146.
113. This is the view of Barton, who after a most careful review of the then existing judicial decisions, particularly those of the Mixed Courts, submitted that a rule of absolute immunity is not to be found in cases concerning foreign troops. See G.P. Barton, "Foreign Armed Forces: Immunity from Criminal Jurisdiction", BYBIL, 27 (1950), 186.

114. See Triandafilou's case, supra.
115. Amrane v. John, Civil Tribunal of Alexandria, 14 January, 1932, Gaz.Trib.Mix., XXIV (1933-34), 108; A-D. (1931-32), Case No. 90, 174; see also A-D. (1933-34), Case No. 74, 187.
116. See Conventions between His Majesty's Government in the United Kingdom and the Egyptian Government concerning the Immunities and Privileges to be enjoyed by the British Forces in Egypt, London, 26 August 1936, GBPP, XXIX (1936-37), Treaty Series No. 6 (1937), 23.
117. See Barton, BYBIL, op. cit., p.186.
118. See Brinton's book, The Mixed Courts of Egypt, op. cit., p.206, n.6.
119. Mark Hoyle lists a number of good points in this regard when he remarked that: "If Greek and French personnel were allowed to behave as they pleased, it would have been to the annoyance and aggravation, not to mention the possible provocation, of the local residents." See his thesis mentioned earlier, p.318.
120. Kildani Haggar's case, discussed in Section III.1(a) supra.
121. Discussed in Section III.1(c) supra.
122. Ibid.
123. See paras. (19) and (20) of the Commentary to Art. 7 of the ILD draft articles, YBILC (1982), Vol. II, Part 2, 160.
124. It should be recalled that the first case in which non-immunity was upheld against property of a foreign state was decided by the Court of Cassation of Belgium in 1930, to the effect that the power to proceed to forced execution is a consequence of the power to exercise jurisdiction. See "Societe anonyme des chemins de fer liegeois-Luxembourgeois", cited in Harvard Law School draft convention on competence of courts in regard to foreign states; see supplement to AJIL, 26 (1932), 612-5.
125. The Lausanne Treaty of Peace with Turkey, 24 July 1923, text in GBPP (1923), Treaty Series No. 16, Cmd. 1929. An extremely informative article upon the question of abrogation of the capitulations of the Ottoman Empire has been written by Leucis Thayer, see AJIL, 17 (1923), 207.
126. Treaty of Preferential Alliance: Britain and Egypt, 26 August 1936, GBPP (1937), Treaty Series No. 6 [Cmd. 5360]; Documents on International Affairs (1936), 487-9.
127. The successful negotiation of the Treaty was described in The Survey of International Affairs (1936), Part V, Sec. (i); see

also "The Egyptian Treaty and After". The R.T., 27 (1936-37), 110-25.

128. These were USA, Belgium, Denmark, UK, Spain, France, Italy, Norway, Netherlands, Portugal, Sweden and Greece. Captain Euan Wallace, the President of the British delegation, also represented the Governments of Australia, India and New Zealand, while the conference took note of a letter from the Canadian High Commissioner in London declaring that his government would accept the provisions of any convention signed and ratified by other members of the British Commonwealth of Nations. For this declaration, see GBPP (1937) [Cmd. 5491], 71.
129. Text in Actes de la Conference des Capitulations (published by the Egyptian Government in May 1937), p.3. An Arabic translation of the circular was courteously supplied by the Egyptian Department of Information, Cairo.
130. The texts of the Egyptian drafts were reproduced in Actes de la Conference, op. cit., 217-24.
131. "Abolition of the Capitulations in Egypt", BYBIL, 19 (1938), 161, at 163.
132. The texts of the Final Act of the Conference, the Convention, the Reglement d'Organisation Judiciaire, and the unilateral declaration of the Egyptian Government may be found in GBPP, XXVIII (1936-37), Egypt No. 1 [Cmd. 5491].
133. Art. 2, paras, 2 and 3. These paras. were adopted only after the Egyptian delegation had reaffirmed their unilateral declaration that its government had no intention of pursuing any policy of discrimination against foreigners. See Art. 2 of the Declaration by the Royal Egyptian Government, op. cit., p.62.
134. France, Italy and Belgium pressed for a term of 18 years, while Egypt backed by GB and the USA, claimed a term of 12 years only. See The Memories of al-Nahhas Pasha (Cairo, 1943), p.47.
135. Art. 3 of ROJ.
136. The Egyptian Premier, Nahhas Pasha, attempted to secure the preliminary support of all the Egyptian political parties for his policy at the conference. Some parties declined his invitation to a conference and strongly opposed his proposals. See The Memories of al-Nahhas Pasha, op. cit., p.157.
137. By para. 1 of the Declaration of the Royal Egyptian Government, 8 states were added in accordance with this provision, namely: Austria, Czechoslovakia, Germany, Hungary, Poland, Roumaina, Switzerland and Yugoslavia. See GBPP (1937) [Cmd. 5491], No. 5.

138. Art. 27. For the meaning of personal status, foreign law and national law of the parties, see Arts. 28-32. See also BYBIL, 19 (1938), op. cit., 179-83.
139. Art. 35. The Mixed Courts had jurisdiction in all bankruptcy cases where any foreign creditor made a claim.
140. The delegates also took note of the Egyptian Declaration and the Canadian letter mentioned above, together with the exchange of letters in which al-Nahhas Pasha assured the Presidents of the American, British, Dutch, French and Spanish delegations that the educational, medical and charitable institutions in Egypt would be permitted to carry on their activities freely until agreement defining their position had been concluded, or in any case until the end of the transition period. These documents are reproduced as Nos 7, 5 and 6 respectively in [Cmd. 5491] of the British State Papers cited above.
141. Art. 15 of the convention. For a discussion on the desirability of such a process, see BYBIL (1938), op. cit., 168-9.
142. See al-Nahhas Memories, op. cit., p.163.
143. The story of the closure of the courts has been told by Judge Brinton in The Mixed Courts of Egypt, op. cit., pp.208-13; "The Closing of the Mixed Courts of Egypt", AJIL, 44 (1950), 303.
144. Law No. 131, 16 July 1948, operative 15 October 1949, as of the date of the closing of the Mixed Courts.
145. A code of 1149 Articles, representing a definite departure from the classic French models. It was solidly based on the mixture of the previous mixed and native codes, together with the Egyptian jurisprudence and various foreign codes from nearly 20 countries. See Abdel Razaq al-Sanhuri, al-Wasit fi al-Qanun al-Madani (Cairo, 1963-1970), Vol. I, Introduction.
146. The National Courts were called 'Tribunaux Nationaux' in order to avoid the term 'Tribunaux Indigenes', or the native courts that existed before 1949, which implies absence of judicial sovereignty. Yet the translator insisted on using the term 'native tribunals' in the official Arab text.
147. See Law No. 462, 1955, operative as from 1 January 1956.
148. However, it should be recalled that the jurisprudence of these courts had been an important source of influence in the process of preparation of the new code. See Abdel Razeq al-Sanhuri, Al-Wasit fi Shah al-Qanun al-Madni (Cairo 1963-70), Vols. 1-10.
149. See Brinton, op. cit., p.211.

150. Federated People's Republic of Yugoslavia v. Kafr al-Zayat Cotton Co. Ltd., Rev.Eg.Dro.Int., VII (1951), 179; ILR, 18 (1951), Case No. 54.
151. ILR, 18 (1951), at 226
152. See Ushakov's memorandum in YBILC (1983), Vol. II, Part One, 53-6, esp. 55, paras. 11-16. See also the Sixth Committee of the General Assembly at its 38th session on the Report of the ILC on the work of its 35th session in which 10 representatives of socialist countries took part in the debates; GAOR, 38th session, Sixth Committee, 36-50th, 54-70th meetings. See also the report and the concluding observations by the Chairman of the Committee, ibid., 34th meeting, paras. 12-20 and 54th meeting, para. 52.
153. See Mr Justice Van Devanter's dictum in Berizzi Brothers Co. v. Steamship Pesaro; U.S., 271 (1925), 562.
154. Case No. 1173, 1963, 8 June 1964.
155. Case No. 811230 Judiciare.
156. Unofficial translation.
157. Where the heads of states were merged with foreign states in the matter of exemption from local jurisdiction, see Art I of para. (a) of the "Draft Convention and Comments on Competence of Courts in Regard to Foreign States, prepared by the Research into International Law of the Harvard Law School", AJIL, 26 (1932), Supp., 476.
158. Cairo District Court, The Civil Circuit No. 4, Case No. 115, April 20, 1971.
159. Law No. 77 of 1949.

CHAPTER FOUR

IMMUNITY OF FOREIGN STATES IN EGYPTIAN LAW

I. TREATY PRACTICE

1. International Conventions relevant to Some Aspects of State Immunity

While as yet there is no general treaty or convention on state immunities,¹ there are several conventions of a universal character which have some direct bearing on the rules of state immunities. An extensive account of these conventions is beyond the scope of this study. The salient provisions of some of those instruments may, however, be noted that touch upon the question of immunity and to which Egypt has become a party.

(a) Brussels Convention of 1926²

The International Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, signed at Brussels, April 10, 1926³, and its Additional Protocol signed at Brussels, May 24, 1934,⁴ deals with immunity in respect of claims arising from the operation of vessels and transportation of cargoes. It lays down the principle that sovereign states which engaged in commercial shipping are liable to suits in local courts, in the same manner as private individuals. Art. 2 provides:

For the enforcement of such liabilities and obligations shall be the same rules concerning the jurisdiction of the tribunals, the same legal actions and the same procedure as in the case of privately owned merchant vessels and cargoes and of their owners.

The convention specifically excludes:

ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships and other craft owned or operated by a state, and used at the time a cause of action arises exclusively on governmental and non-commercial service. 5

It is interesting to note that there is no immunity reserved for foreign states in the field covered by the convention except for the classes of vessels listed above, which apparently were deemed to comply with the two requirements set out in the provision: "belonging to or being operated by the contracting state" and "being on governmental and non-commercial service". These criteria by which to judge immunity are linked to a time factor. Their relevance depends on those particular conditions being met at the time the obligations were created.

In case a seizure or arrest of a foreign vessel is in doubt as to whether that vessel falls within the scope of Art. 3, Art. 5 provides for the procedure to be followed by that court in order for it to avail itself of the information needed. The diplomatic representative of the state that owns the vessel may be invited to inform the court of the nature of the vessel concerned. This is a practical solution and an acceptable one, since it will be for the judiciary of the forum-state and not for the executive branch to take the initiative. Most significantly, the convention has removed the difficulties arising out of the traditional claims of foreign states to immunity from execution in respect of proceedings connected with their maritime property. In all cases concerning salvage and general average claims, agreement relating to a hire of a ship or of the carriage of goods, damage caused by the ship either in collision or otherwise, loss or damage to cargo, etc., the state may be sued and the judgement, if given against the foreign state, may be enforced by arresting the ship and seizing her cargo.⁶

Egypt was not among the original signatories to this convention but has subsequently adhered to it in 1951.

In relation to this convention, the question of state succession does not arise as the convention includes a territorial clause enabling a high contracting party at the time of signature or ratification or accession to extend the application of the convention to its self-governing dominions, colonies, overseas possessions or protectorates.⁷ However, at the time of the

signature of the convention by Great Britain, no such declaration was made in respect of Egypt nor any other of its overseas territories or dominions. The absence of such a declaration, although not conclusive as to the status of Egypt, may serve as an indicator in that particular respect. However, it should be borne in mind that the United Kingdom itself had not ratified the convention until 1980.⁸ At the time of the adoption of the Brussels Convention and its Supplementary Protocol, Egypt was already an independent sovereign state, and when she acceded to these instruments, she was exercising a mere right of accession and not succession.

(b) The Law of the Sea Conventions

Egypt is also a party to other multilateral conventions partially dealing with similar issues. The Geneva Convention of 29 April 1958 on the Territorial Sea and Contiguous Zone⁹ contains provisions confirming the principle of state immunities in respect of warships and other vessels employed in governmental and non-commercial service. Part I, Section III, of the convention deals, inter alia, with the right of innocent passage to which it would seem that under the provisions of the convention all ships are entitled. This section is divided into four sub-sections: A. Rules applicable to all ships; B. Rules applicable to merchant ships; C. Rules applicable to government ships other than warships; D. Rules applicable to warships.

Art. 21 provides that "the rules contained in sub-sections A and B shall also apply to government ships operated for commercial purposes". Sub-section A deals with the right of innocent passage which all ships can exercise. Sub-section B deals with the jurisdictional powers of a state in respect of foreign merchant ships. Art. 19 of subsection B deals with criminal jurisdiction with regard to crimes committed on board foreign merchant ships. Art. 21 says that these rules are applicable to government ships operated for commercial purposes. The combined effect of Arts. 19 and 21 would be the complete assimilation of the position of a

government merchant ship to that of a private merchant ship for the purpose of Art. 19. The vessels are characterized under the convention according to the nature of their service or activities. The old tendency to treat ships as state ships simply by virtue of their ownership appears to have been abandoned.¹⁰ However, the coastal states are under a duty, according to Art. 22, to respect the rules of international law, particularly those relating to the privileges of certain government ships.

As far as immunity from execution is concerned, this convention occupies a special place; it adopts the solution which had already existed in the Brussels Convention of 1926 in respect of measures against vessels of foreign states. In fact, taken together, Arts. 20 and 21 of the Geneva Convention enable measures of execution and sequestration of vessels of foreign states being used for commercial purposes, albeit within rather restricted limits.

The Second Geneva Convention¹¹ reiterates the principle of immunity of ships on the high seas (Art. 8(1)), yet the convention limits the application of this immunity to certain classes of public vessels only, namely: warships and ships owned or operated for government non-commercial service (Art. 9). The term 'government-ship' covers both state-owned and state-operated ships engaged in non-commercial activities and other government ships. The former, while on the High Seas, enjoy "complete immunity from jurisdiction of any state other than the flag state". All other government ships are not so immune and are accordingly treated as private ships.

These two conventions clearly reflect the principles laid down in the Brussels Convention of 1926 and thus confirm the distinction between warships and state-owned ships operated for commercial purposes. In this context, the 1958 Geneva Convention may be said to be declaratory of the current state practice in this field.¹²

The trend to equate state-owned ships operated for commercial purposes with private merchant vessels has received further

confirmation in the 1982 United Nations Conventions on the Law of the Sea.¹³ Art. 236, entitled "Sovereign Immunity" provides:

The provisions of this convention do not apply to any warship, other vessels or aircraft owned or operated by a state used, for the time being, only on government non-commercial service.

Apart from confirming the distinction, the provision also lays a special emphasis on the character of the service of the ship concerned for the purpose of determination of the existence or non-existence of immunity. Egypt acceded to the convention on 26 August 1983.¹⁴ Such ratifications cannot be dismissed as mere acceptance of the distinction, since it is on the basis of that distinction that the status of the ship and the extent of sovereign immunities are to be determined.

(c) Vienna Convention on Diplomatic Relations 1961

A further example of the kind of rules incorporated in international conventions affecting jurisdictional immunities of foreign states and their property may be taken from the Vienna Convention on Diplomatic Relations 1961.¹⁵ Like the former, this convention is the outcome of the work of the International Law Commission (ILC). During the preparatory work, various theories were advocated concerning the judicial bases of diplomatic immunities. The first was that of extra-territoriality of the diplomats and of embassy premises according to which the premises of the mission represent a sort of extension to the territory of the sending state. The majority of members of the ILC found it hard to accept this fiction. The dismissal by the ILC,¹⁶ following a similar rejection by the League of Nations Experts Committee,¹⁷ may be taken as conclusive. The remaining explanations, based on the representational qualities of the diplomat and functional necessities of his office, are not so much opposed as complementary. The chief importance of the functional explanation lies in its shifts of emphasis; it indicates the way in which states have sought to move away from the assumption that immunities might be demanded automatically on a plea of sovereignty; to the notion that the question whether or not immunities are to be accorded is one

which is subject to re-assessment in the light of practical needs.¹⁸ In fact, the commission was guided by the functional theory: "in solving problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself".¹⁹ The result was that both theories are yoked together in the Preamble of the convention: "... the purpose of privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of the diplomatic missions as representing states".

It is clear from what has been said that the Vienna Convention restates the general principle, that a foreign state and its property are immune from civil and administrative jurisdiction, as long as it acts in its governmental capacity. Art. 22 of the convention that deals with the inviolability of the premises of the mission reiterates the same principle. It was clear enough from the text as it stood that the mission premises were the premises used for the functions of the mission. Such inviolability is not the consequence of the inviolability of the head of the mission, but is an attribute of the sending state by reason of the fact that the premises are used as the headquarters of the mission.²⁰ It may be of interest to note that some members of the ILC took the view that the immunity of the premises of the mission is a distinct "form of state immunity attaching to a building used for governmental purposes".²¹ Thus Art. 22 of the Vienna Convention is also apparently based on the idea that the immunity of embassy premises is justified by, but is also limited to, the purpose of providing protection for diplomatic activities.

Again, according to Art. 24, mission archives and documents are declared inviolable. Inviolability is accorded in instances where the papers are manifestly used for the legitimate functions of the mission and in this context the functional theory has again been endorsed. Art. 27 of the convention, although conferring immunity on the diplomatic bag by maintaining that the diplomatic bag may not be opened or detained (Art. 27(2)), it should also be recalled that

this inviolability is limited to a bag containing diplomatic documents or articles intended for official use.²²

The fact that diplomatic immunities belong to the state and not to individuals or property may be supported further by Art. 23 which provided that the immunities might be waived by the sending state. Thus immunities are attributed to a state as a subject of international law and therefore are restrictively confined to the sovereign functions of that subject, and in the course of the work of elaborating the convention, the immunities of diplomatic missions have been considered as one aspect of the immunity of the state, although strictly speaking it does not cover the immunities of state per se.

In fact, there is a gap in the 1961 Vienna Convention concerning immunity from jurisdiction of the permanent diplomatic mission in its capacity as an organ of the foreign relations of the state. Art. 22 does not refer strictly to immunity from jurisdiction but to inviolability. Undoubtedly, inviolability is the privilege, or in other words, the essential immunity, from which other immunities can be deduced, principally immunity from execution of judgement, taxes and tariffs. Egypt acceded to the convention on 19 June 1964 with a minor reservation.²³

(d) Vienna Convention on Consular Relations 1963²⁴

This convention was acceded to by Egypt on 21 June 1965.²⁵ While there was clearly some relationship between diplomatic intercourse and immunities and consular intercourse and immunities, it was not a relationship of an organic type, as had been the case with the various subjects discussed at the UN Conference on the Law of the Sea 1958. It contained corresponding provisions partially covering the immunities of state property used in connection with the consular mission and for what is regarded as essential for the performance of their official functions.²⁶

(e) International Convention on Civil Liability for
Oil Pollution Damage 1969

With the increasing threat that pollution from foreign ships has posed to the coastal states, the issue of who has the jurisdiction over the offending vessels has been a significant source of serious controversy between coastal and flag states at the UNCLOS III. Following the accident of the Torrey Canyon in 1967,²⁷ a conference was held at Brussels to tackle the issue of oil pollution and to adopt measures of an exceptional character to protect the maritime interests without affecting the principle of freedom of the High Seas. Subsequently a convention was signed on 29 November 1969,²⁸ giving the coastal state the right of intervention in cases of maritime casualties, "which may reasonably be expected to result in major harmful consequences".²⁹

Most significantly the principle of immunity of state vessels found its way into the convention. Paragraph (2) of Art. 1 reads:

2. However, no measure shall be taken under the present convention against any warship or other ships owned or operated by a state and used, for the time being only on government and non-commercial services.

The convention restricts the immunity to ships employed by the flag state for governmental purposes, thereby excluding state-owned merchant vessels.

The conference was sponsored by IMCO (now IMO),³⁰ and Egypt, as an IMCO member, was among the voting participants. The ratification or accession of Egypt to this and other maritime treaties is not without significance in confirming an exceedingly important distinction between warships and other government ships, a distinction so vital to the question of state immunity. Most of these conventions are intended to be of a universal character and some of them could even be regarded as declaratory of existing state practice on these issues.

(f) Convention on the Settlement of Investment Disputes
between States and Nationals of Other States, 1965

Egypt was among the first countries to ratify the ICSID convention, signed at Washington in 1965.³¹ The convention provides for recourse to arbitration by the centre set up for that purpose only with the express consent of the state party to the dispute. The centre's most important objective is to provide a climate of mutual confidence between foreign investors and host states so as to encourage the flow of resources to developing countries on reasonable terms.³² Much has been written about the ICSID,³³ but for the purpose of the present section, the discussion will focus primarily on the issue of sovereign immunity under the convention.

i. Immunity from jurisdiction

Under the provisions of the convention, immunity from suit is eradicated at the outset. The convention prevents a contracting state from raising any plea of immunity that would frustrate the proceedings or the recognition of the award. Consent to ICSID arbitration and the binding character of the resulting awards constitute an irrevocable waiver of immunity from jurisdiction. Art. 54 of the convention bars the contracting state from raising at the time of recognition or enforcement of an ICSID award the plea of sovereign immunity from jurisdiction. This rule is undoubtedly of paramount importance to the effectiveness of the award rendered. Furthermore, a plea of immunity would constitute a serious interference with the ICSID machinery and would be incompatible with the freely given consent by that state to ICSID arbitration.³⁴ Indeed, raising the plea of immunity would be inconsistent with the free will and equality of the parties, in the sense that the state party to arbitration would resort to a type of defence which is totally unavailable to the other party who is assured that such immunity is being waived by the state partner.

ii. Immunity from execution

Unlike immunity from suit, the convention surrenders measures of execution to domestic rules of immunity. Art. 55 provides:

Nothing in Article 54 shall be construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state from execution. 35

Thus it is possible, as in the case of other arbitral awards, that those rendered within the framework of the convention will be subject to different treatment in contracting states. It is obvious that under the article a contracting state may forcefully oppose an ICSID award on the basis of sovereign immunity and that is bound to raise doubts as regards the effectiveness of the whole machinery, and the solution adopted by the convention in this particular regard is to be regretted. However, this singular shortcoming may well be appreciated if a number of considerations are borne in mind:

1) The solution thus adopted could not be avoided in view of the fact that, at the time when the convention was drafted, there were divergent opinions among the representatives on the meaning and scope of immunity from execution.³⁶

2) Since the convention entered into force in 1966 the restrictive doctrine of immunity has significantly extended to cover immunity from execution as has already been mentioned elsewhere. This new progress seems to give a new practical significance to ICSID awards. The investor in whose favour the award is rendered is now in a position to choose the forum within whose jurisdiction the assets of foreign states are located and which jurisdiction recognizes non-immunity from execution and thus increases his chance of success.³⁷

3) The shortcoming can also be mitigated by the fact that the parties may at the time of the negotiation of the agreement to submit the dispute to the ICSID, exclude expressly the right of the

state party to raise the plea of immunity from measures of enforcement in connection with the execution of the resulting award.

Moreover, issues of immunity from execution should, however, be viewed in the context of the convention as a whole, which offers definite safeguards to the investor. The plea of immunity would be contrary to the obligation of the contracting state to comply with the award and the state involved would be exposed to various sanctions provided for under the convention.³⁸ In the light of these considerations, the theoretically troublesome issue of sovereign immunity under the convention appears to raise no major difficulties and seems to lose a great deal of its practical significance. By signing the ICSID convention and entering into ICSID arbitration, Egypt or its state entities have effectively waived their immunity from jurisdiction, although such waiver does not, however, constitute a waiver of immunity from execution.

Relating to consent, Art. 25 provides that: "When the parties have given their consent, no party may withdraw the consent unilaterally". However, the situation may be more complex when the governmental party raises a last-ditch defence based on ultra vires. If the signatory to the agreement to arbitrate lacks the capacity to conclude the agreement, then the consent of the sovereign may be challenged as null and void.

In Egypt, public sector commercial entities are given general freedom to contract loans by the present Public Sector law.³⁹ Where the signatory is the government itself or one of the ministries or a constituent subdivision or an agency of the Egyptian Government, then the agreement must be approved by the people's assembly. In the case of a loan, this is a requirement laid down by the Egyptian constitution, Art. 121 of which says: "The executive authority shall not contract a loan except with the approval of the people's assembly". Once approved, the loan agreement is published in the official Gazette and becomes a public document.⁴⁰ The publication of the agreement, including the clause to arbitrate, in the Egyptian official Gazette constitutes an irrebuttable

presumption that the governmental entity in question is duly authorized to sign the arbitration agreement, and consequently it rules out the possibility of a plea of immunity being raised on ultra vires grounds.

Since Egypt's ratification of the convention in 1976, 12 cases involving Egypt have been presented to the ICSID, six of which are pending; four have been the object of settlement; and only two have resulted in an award.⁴¹

The Egyptian ratification of the convention is significant to the issues of sovereign immunity in that it shows that Egypt, as a developing country and importer of technology and investment, is prepared to waive its immunity in cases involving investment disputes, at least at the adjudicative level of the proceedings, as far as the ICSID arbitration is concerned. It also shows foreign investors that there is no restriction in Egyptian law upon Egypt's authority to subscribe to such waivers.

(g) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958⁴²

The distinction between recognition and enforcement is critical in litigation against sovereign entities because, according to different legal systems, a state may waive its immunity from jurisdiction without waiving its immunity from execution. Thus both sovereign entities and private parties will look to applicable treaties to obtain the recognition of the award, including the New York Convention on the Recognition and Enforcement of Arbitral Awards, accepted by Egypt on 9 March 1959.⁴³

The convention endorses the principle of recognition and enforcement of foreign arbitral awards and endows foreign awards with the same status as domestic awards. It recognizes the principle of the binding nature of the foreign arbitral award without the need for it to be embodied in a judicial decision. The

convention contains provisions regarding, inter alia, recognition of an agreement in writing to submit to arbitration (Art. II) and recognition of arbitral awards as binding and enforceable in accordance with the rules of procedure of the state where the award is relied upon (Art. III). Under the convention there are a number of grounds on which confirmation of an award will be refused (Art. V).

1) The convention requires that a foreign arbitral award must be made in a contracting state according to the local procedural rules. However, doubts might be raised where it may be held that the sovereign state cannot be presumed to submit the local procedural rules and thus waive its immunity.

2) A sovereign defendant state could challenge recognition of a foreign arbitral award on the ground of its lack of capacity to enter into the agreement to arbitrate.

It should also be borne in mind that the convention permits the contracting state to reserve its application to its commercial transactions. A private party should therefore include a stipulation in its contract with a sovereign entity to the effect that the latter engages in the performance of the contract in his private capacity and not as a sovereign authority. In this way the private party would ensure that the defence of sovereign immunity will not be raised on the basis that the sovereign entity has entered into the commercial contract for purely public purposes.

In contrast to the ICSID arbitration, the New York Convention offers a definite advantage. Under the ICSID Convention the award is final and binding upon the parties, and remedies against the award are limited to revision on the ground of newly discovered facts (Art. 51) and annulment on certain restricted grounds (Art. 52). The ICSID Convention also eliminates many of the grounds for attacking awards under the New York Convention, such as public policy grounds,⁴⁴ even although the former convention, as has

already been noted, has not totally eliminated the problem of sovereign immunity from execution.

Although there is domestic legislation governing recognition and enforcement of foreign judgements in Egypt, there is no corresponding enactment for the enforcement of foreign arbitral awards. Yet there are a number of court decisions confirming the enforceability of foreign arbitral awards.⁴⁵ However, the Egyptian courts have not always used the convention and have instead applied the rules set out in the code of Civil and Commercial Procedure for the Enforcement of Foreign Judgements to the Enforcement of Foreign Arbitral Awards.⁴⁶

It should be emphasized that the practical recognition of foreign arbitral awards in Egyptian courts is drastically limited. Certain problems have arisen in connection with the enforcement of such awards involving challenges to the validity of ICC arbitration clauses and ICC arbitration proceedings themselves. In the majority of cases, the Egyptian party to an ICC arbitration clause argued that these clauses are incompatible with Art. 502 of the Egyptian Code of Civil Procedure relating to the mechanism of the appointment of arbitrators. The Egyptian courts have tentatively allowed this line of argument to prevail. In several cases the Egyptian courts have stayed the arbitration proceedings while awaiting the examination of the case on its merits.⁴⁷ In other cases the very ICC proceedings have been attacked in Egyptian courts and judgements given tended to annul the arbitration itself.⁴⁸

These decisions have called into question the advisability of using the Cairo Regional Arbitration Centre,⁴⁹ an arbitral institution established in Egypt in 1983 with the collaboration of the Egyptian Government. This concern was first felt in the Centre itself and it submitted a memorandum to the Egyptian Government asking for an amendment in the law in order to clarify the legal position and avoid uncertainties concerning the enforcement of their awards.⁵⁰ The Egyptian attitude has been criticized by a number of leading experts in the field of arbitration⁵¹ who stressed the need

for an urgent clarification of the meaning of Art. 502 of the Egyptian Code of Civil Procedure so as to restore the confidence of international businessmen in the feasibility of having recourse to arbitration with Egyptian parties and on the efficacy of international arbitration in Egypt.⁵²

To sum up, a foreign arbitral award is final and binding and cannot be appealed against in Egyptian courts. As a contracting state to the New York Convention, foreign arbitral awards, especially when rendered against the Egyptian Government or one of its public sub-divisions, should be treated as final and binding except in cases provided for in Art. 2 of the Convention. However, a private party, in whose favour an award has been rendered, has to take into account the fact that the significance of the binding character and finality of the award is seriously mitigated under the present Egyptian case-law. The fact becomes crucially important for a private party obtaining an award against an Egyptian sovereign entity which has assets only in Egypt and where the award may only be enforced there.

2. Bilateral Treaties

In contrast to its participation in multilateral treaties, Egypt has rarely concluded bilateral treaties with foreign states in this field. One of the bilateral treaties which deserves to be mentioned is the Protocol on the Trade Delegation of the Union of Soviet Socialist Republics in the Republic of Egypt.⁵³ According to Art. 2 the functions of the Delegation have been enumerated as follows:

- (a) to promote the development of trade relations between the USSR and the Republic of Egypt;
- (b) to represent the interests of the USSR in the Republic of Egypt in all matters relating to foreign trade;
- (c) to carry on trade between the USSR and the Republic of Egypt.

The status of the Delegation in the territory of Egypt has been explicitly provided for in Art. 3:

The Trade Delegation shall form an integral part of the Embassy of the Union of Soviet Socialist Republics in the Republic of Egypt, and shall have its headquarters in Cairo.

and as such:

the Trade Representative of the USSR in the Republic of Egypt and his deputies shall enjoy all the privileges and immunities accorded to members of diplomatic missions.

Art. 6 of the Protocol significantly provides that: "the privileges and immunities accorded to the Trade Delegation under Article 3 above shall apply also to its trading activities". Nevertheless the same Article categorically excludes jurisdictional immunities in disputes.

(a) relating to commercial contracts concluded or guaranteed in the Republic of Egypt by the Trade Delegation in accordance with Article 2 of this Protocol in such cases the Trade Delegation shall designate a representative to appear on its behalf before the court.

Paragraph (b) even authorizes enforcement of judgments in Egypt: "final judicial decisions against the Trade Delegation relating to commercial contracts concluded or guaranteed by the Trade Delegation". Such execution may be levied "only on the property of the Trade Delegation and on goods belonging to it". Despite these reservations, the derogation from the principle of state immunity is crucially important; in particular, that jurisdiction over disputes involving commercial transactions concluded or guaranteed by the Trade Delegations are, as a general rule, subject to the jurisdiction of the courts of Egypt.

In substance the Protocol reproduced the relevant provisions of several other treaties concluded by the USSR relating to the status of the latter's Trade Delegation (discussed in Chapter 2). It is, however, noteworthy that the Protocol concluded with some of these states excluding provisional measures but allowing execution of final judgment against the Trade Delegation "not only on property and goods belonging to the delegation itself", as had been the case with the Egyptian Protocol, but on "all property of the Soviet State".⁵⁴ These are, of course, minor differences and in any case

confirm the view that the Soviet Union's treaty practice by no means favours absolute immunity and in no case do these various agreements provide for the exclusion of local jurisdiction and enforcement.

Another example of Egyptian bilateral treaties in this respect can be furnished by the Agreement with regard to commerce and trade concluded with Japan in 1985,⁵⁵ which reflects a substantially similar trend. Immunity from jurisdiction and execution have been dealt with in Art. 7 which reads:

In disputes relating to commercial transactions entered into by the Japanese Government or one of its commercial enterprises, the Government of Japan shall claim no immunity from suit or from execution before any of the Egyptian Courts. 56

This provision amounts to an expression of waiver of immunity from jurisdiction and immunity from execution, although it is not clear whether the provision also covers attachment and arrest. The words are general enough to include attachment, since attachment is a corollary to the assumption of jurisdiction and also serves to provide security or guarantee of payment or satisfaction of the final judgement against which no immunity could be invoked. The provision also indicates consent on the part of the Japanese Government to attachment and execution in respect of all property belonging to that Government in its private capacity or at least in respect of special types of property, particularly those relating to the dispute before the court. The provision, however, cannot be construed to include other types of state property used for official functions such as diplomatic premises and property, for these are protected by international arrangements of a customary nature. It is of interest to learn that the immunity is not regulated on a reciprocal basis, and this in turn tends to support the restrictive attitude of both governments towards immunity from suit and execution.

The examination of these multilateral and bilateral treaties appears to confirm the proposition that Egyptian treaty practice establishes at least one important feature of the law of state immunity, that restrictive immunity is established as a kind of

common denominator both for jurisdiction and execution. In no case do these various conventions and treaties make ownership on the part of foreign states a decisive criterion to determining immunity questions. The real test in most of these instruments lies in the nature of the activities or of the property involved as the case may be.

The above Egyptian treaty practice is relevant at a variety of levels. In the first place, Egypt's multilateral treaty practice is entirely consistent with the restrictive doctrine of foreign sovereign immunity. In the second place, and despite its limited bilateral practice in this field, a similar consistency is fairly observable in the few bilateral treaties that Egypt has concluded with other states. In the third place it is of course unnecessary to emphasize the importance of the multilateral conventions in this complex branch of the law. Within the limits of their application such conventions help to rule out any uncertainty as to the position of foreign states. At any rate, Egypt's multilateral practice may be significant from a quite broader viewpoint; namely it lends support to the view that the restrictive doctrine of foreign sovereign immunity constitutes the general rule of customary international law. This broader relevance is particularly important since some of these conventions explicitly recognize that their provisions enunciate general norms of international law and thus claim to codify rather than develop the law.⁵⁷ Furthermore, treaty practice in and of itself constitutes an important form of state practice and may also be evidence of opinio juris. That state treaty practice is generally regarded as being significant for the formation of customary law goes back, in part, to the Asylum case:

A custom could not be invoked against Peru, which far from having by its attitude adhered to it, has on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions. 58

The ICJ appears to have taken a similar stand in The North Sea cases, where it stated that: "a very widespread and representative participation in the convention might suffice of itself"⁵⁹ for a conventional rule to generate customary law.

In the writings of jurists the same view enjoys wide predominance. For instance, Thirlway maintains that:

It is also possible to regard ratification of a general convention as acts of state practice accompanied by opinio juris if the latter term is widened ... to include the intention to conform to and to assist the emergence of a developing rule of a customary law. 60

and Professor Baxter argues that:

With ratification and with entry into force of the agreement ... the signatory firmly commits himself to the view of customary law set forth in the treaty. 61

Other writers have also maintained that: "the strongest expression of opinio juris is the ratification of the law-making treaties".⁶² However, it might well be argued that acceptance of these conventions by Egypt would involve recognition of dozens of articles with an indeterminate number of rules contained therein, and yet an expression of opinio juris, in order to be effective, must be directed towards concrete legal rules. Whatever the merit of this argument, its practical effect would be lessened if we consider that, for signature or ratification of the convention or the subsequent practice of the parties to have any significance for the formation of customary rule, the opinio juris would have to be demonstrated beyond the mere contractual obligation.⁶³ Egypt, even before acceptance of these conventions, has maintained, in different quarters, that in its view, the conventional rules were also customary, as evidenced by the statement of her delegation before the Afro-Asian Legal Consultative Committee. However, upon entry acceptance, or after entry into force of conventions, there is a lack of a definite statement on the part of the Egyptian state that it has adhered to the conventional rules on account of the customary rules embodied therein.

Moreover, the absence of reservation in the Egypt's acceptance of these conventions, directed toward the articles providing for immunity or non-immunity, is highly relevant in this context. Although the absence of such reservation is not conclusive as to Egypt's opinio juris, it serves as an indication of the acceptance

of the general framework of the customary law embodied in these conventions.

II. GOVERNMENTAL PRACTICE

1. Views expressed within an International Forum

The practice of the executive branch of the government, the organ charged with conducting the state's foreign relations, constitutes another important source of international law of state immunities. While Egyptian municipal decisions and treaty practices are numerous, there appears to have been no incident in which an Egyptian court deferred to the Ministry of Foreign Affairs on the issue of sovereign immunity. The absence of such deference has been explained by an Egyptian writer on the subject⁶⁴ in a rather convincing manner. A.A. Sirhan observed that the present trend of non-deference is in keeping with the restrictive view of immunity adopted by the Egyptian court since the 19th century. Again, the non-existence in Egypt of national legislation regulating the claims of sovereign immunity makes it a little bit difficult to assess the contribution of the executive branch as reflecting the position of the state as grantor or recipient of state immunity, since the administrative branch can play a central role in initiating, introducing and assuring the passage of legislation on state immunities in line with the views and policy of the government in power.

This relative dearth of materials in the form of internal or interdepartmental advice or diplomatic correspondence should not, however, constitute a major problem in identifying the views of the Egyptian Government on questions of state immunities. The ILC was of the opinion that this obstacle could be effectively overcome by examining the views which had been received from various governments in response to the requests of the Commission.⁶⁵ The Commission invited the member states to reply to a questionnaire on the topic

"Jurisdictional Immunities of States and Their Property" prepared by the Commission's Special Rapporteur in cooperation with the Secretariat.⁶⁶ The answers by the governments to the questionnaire, with additional comments and suggestions, could help to fill in the gaps.⁶⁷

The questionnaire⁶⁸ consisted of 20 different questions covering almost every aspect of the issue under study by the Commission. It would not be useful to the present inquiry to look into the replies on an answer by answer basis. Instead, the views expressed by the Egyptian Government as a whole are summarized as follows:

- i- There is no text in Egyptian law which expressly recognizes or denies immunity of foreign states.⁶⁹
- ii- The practice of judicial decisions in Egypt tends to base the immunity accorded to foreign states and their property on principles of international law. (Answer to question 2).
- iii- The reply also endorsed the rule that the plea of immunity from jurisdiction is a matter of public policy.
- iv- The Egyptian courts, according to the reply, have firmly adhered to the doctrine that immunity of foreign states is not absolute, but rather is limited to acts of sovereign authority.
- v- As far as the views of the executive branch of the Egyptian Government are concerned, in the reply it was stated that it adopts the restrictive view of immunity. The opinions of the executive branch regarding the question whether or not, in a given case, a particular government ought to be accorded state immunity is not conclusive and is subject to the control of the judiciary according to certain constitutional limitations. (Answer to question 4).
- vi- It is clear from the reply that general information about the applicability of the doctrine of reciprocity by the Egyptian courts could not be provided because there are no known cases in which this issue has arisen. (Answer to question 5).

As a whole, the reply is further strong evidence of the Egyptian Government's adoption of restrictive immunity of foreign

states in its official practice. The importance of the reply lies not only in the fact that it expresses the view of the Egyptian Government as a territorial state granting or denying immunity but also in reflecting the view that such immunity might not be claimed by it if sued before foreign courts in certain cases. Under these circumstances it would not be conceivable for the Egyptian Government to rely on the absolute doctrine of state immunity if sued before the court of another state in cases relating to its commercial activities, for states are not only grantors, but also beneficiaries of immunities. It is in this context that the reply serves to act as a two-way system. However, in practice, the Egyptian Government had adopted the entirely reverse attitude, as will be more fully discussed later.

The Egyptian judicial practice on state immunity has been repeatedly referred to by the International Law Commission in its work on the subject.⁷⁰ As a matter of fact, it is the only developing country whose practice the Special Rapporteur systematically cites. He is of the opinion that the judicial practice of countries other than of common law jurisdictions and the civil law system during the formative period of the law of state immunity was not so firmly established on the question because African countries were not composed of many independent sovereign states and the independent sovereign countries of Asia were subject to the foreign extraterritorial rights known as capitulations. It is interesting to mention in this respect that the judicial practice of Egypt to which the Special Rapporteur is currently referring, is a direct result of this very system of capitulations by which the Mixed Courts of Egypt were established. At any rate, all the Egyptian judicial practice employed by Mr Sucharitkul is clear, and often strong, evidence for the wider restrictive view of immunity upon which he seems to base his draft Articles on the topic.

The position taken by the Egyptian delegates in the Sixth Committee sheds little light on the Egyptian practice on the subject. In discussing the Report of the ILC on its work during the 34th session, the Egyptian delegate, Mr El Banhawy, expressed

his delegation's endorsement to the method adopted by the International Law Commission in studying the subject generally.⁷¹ In the discussion during the 37th session of the Committee, Mr El Banhawy again fully supported the conclusions reached by the Special Rapporteur regarding the subject and in particular the following four points:

- i- that jurisdictional immunities of states and their property were not a pre-emptory norm, since they could be renounced;
- ii- that the claim to immunity should be limited to cases under consideration by the courts of other countries;
- iii- that the legal basis for the articles emanated from state practice; and
- iv- that the subject should be approached flexibly in order that the great majority of states might be able to accept the Commission's recommendations.⁷²

So far these are the only instances in which the Egyptian delegation to the Sixth Committee has expressed its views on the subject. However, it should be mentioned that, during the preparation of this study, the views of the Egyptian Government on the ILC's work and its draft Articles have not been made known.

2. Opinions expressed within Regional Forums

(a) Asian-African Legal Consultative Committee

The statements expressed by the Egyptian Delegation in the Asian-African Legal Consultative Committee are illustrative.⁷³ The committee discussed the immunities of states at its first and second sessions at New Delhi (1957) and Cairo (1958) respectively, and concluded its work at its third session in Colombo (1960).⁷⁴ As mentioned elsewhere, the subject was referred for the opinion of the committee by the Indian Government. At the Cairo session, the secretariat of the committee, in order to help the committee to finalise its report on the topic of state immunity, invited all participant countries to take part in the questionnaire prepared by the Secretariat.⁷⁵

The questionnaire was divided into seven parts, each of which dealt with a separate heading. The salient questions were inserted under the appropriate headings, namely: general aspects of state immunity, governmental activities of a purely 'private' or 'commercial' nature, state trading organizations, position of foreign trade representatives or agents, suits against foreign states and their instrumentalities, and finally questions tending to provide answers towards the solution of the problem. Instead of beginning with the general aspects of the topic, the questionnaire began with questions on the legal conception of state immunities. Detailed questions on the subject were inserted. The committee had also tried to bring about a certain uniformity in the order of the treatment of the issues involved by requesting that the order of the questionnaire be followed. Questions were also worded simply, clearly, straightforwardly and briefly. Compared with the UN Secretariat questionnaire referred to above, that of the Asian-African Committee differs materially in order and emphasis and considerably in content and method. The work of the committee on state immunity has received general acceptance by the world community through their citation and examination by different courts and jurists.

The answers prepared by the delegation of the UAR (Egypt and Syria)⁷⁶ were elaborate and informative. For the sake of brevity, the view of the Egyptian Government, as they were reflected in the reply, may be briefly noted as follows:

- 1) The doctrine of sovereign immunity should be limited in its application to public acts of a foreign state. A distinction should always be made between acts performed by the state in its capacity as a sovereign power and other acts, even if these are non-commercial transactions.
- 2) The delegation agreed with the view expressed by some members that the state assumed the role of a private person by entering into

trade or other private activities and in respect of such transactions its waiver of immunity should be presumed.

3) Although the Egyptian Government engages in the purchase of materials and equipment from foreign countries and these transactions are negotiated either through government officials or by companies controlled by the government, any claims of state immunity arising out of such transactions are not to be recognized.

4) In spite of the fact that the Egyptian Government owns ships which are run for commercial purposes, and companies controlled by the Economic Development Organization practising banking and insurance business in some of the Arab countries, the Egyptian Government takes the view that any disputes arising out of such transactions should be subjected to local courts whether or not they are carried out by the state itself or by the state trading organizations.

5) The granting of immunity to governmental trade representatives or agents depends on the nature of the transactions performed by such representatives or agents.

6) When the plea of immunity is raised by a foreign state, the court's decision on a sovereign immunity question is exclusively a matter of judicial process and as such should not be left to the discretion of the executive branch.

7) In cases where a decree is passed against a foreign state, such a decree may be executed on its private property. It is essential that the property in question be within the jurisdiction of the court. As for execution on its private assets located abroad, this depends upon the law of the defendant foreign state or the law of the country within which the asset is situated. The answer expressly excluded measures of execution against the public property of the foreign state.⁷⁷

8) In an answer to the question whether the contesting parties to the dispute can seek international judicial settlement on any question of state immunity rather than municipal litigation, the UAR replied that the municipal courts should remain competent to decide such questions. But, according to the memorandum, this should not be taken to mean that the matter of state immunities is not suitable for settlement by arbitration.

It is clear from the memorandum that the Egyptian Government regards sovereign immunity as limited and always subject to restrictions. It is interesting to note that the memorandum has presumed the existence of valid territorial jurisdiction and waiver of immunity from the mere fact that the foreign state has entered the free market, although such a presumption can neither be supported by practice nor by doctrine, yet it appears to be based on practicality since experience has shown that participation by states in trade automatically entails waiver of immunity. Most significantly, the memorandum expressly stated that the government cannot claim immunity from suit in relation to its trading activities, no matter how such transactions are conducted, as long as those transactions are commercial by nature.

The memorandum also endorsed the fact that the adjudication of suits involving foreign states is essentially a legal matter and should not be influenced by foreign relations considerations. This view tends to suggest that the best course is for disputes to be litigated in ordinary courts away from state-to-state negotiations. Indeed, diplomatic negotiations are notoriously a very bad substitute for an exact determination of legal rights and obligations both under municipal and under public international law. If the private entity or individual would have to rely on its government to assert its claim through diplomatic channels, obtaining redress would become very difficult. Negotiations would be of small comfort to the private individual who is a third important element in the dispute. In this way, direct recourse by private individuals to ordinary courts seems to be the only effective guarantee against their trading partners and in accord

with the restrictive theory. It is probably due to these factors that the memorandum even preferred the dispute to be submitted to the national courts rather than to international judicial authorities, though without a prejudice to settlement by arbitration.

(b) The League of Arab States

The Arab League, under its pact, is authorized to prepare draft Articles for approval by its member states.⁷⁸ The question of state immunity has not, however, attracted the attention of the League or its Legal Committee. However, the committee, on the basis of 11 subjects listed in the 1964 memorandum of the Secretary-General of the Legal Committee, selected a list of six topics, including the question of state immunity. But the topic has never been tabled for discussion by the Committee,⁷⁹ nor does there appear to have been any step taken in the form of recommendation, draft Articles, or a resolution concerning the subject. This singular absence of any initiative does not necessarily indicate a lack of interest on the part of the League and its legal committee, but is merely a question of priority in the Council's requests. It might be further observed that rules governing state immunity are urgently needed, particularly for those groups of states in which there is much latent hostility between the sundry members, whereas the need is not so pressing with regard to the smaller, regional organizations where, presumably, there is greater concurrence of aims and purposes and less in the way of international business transactions and international adjudications. This may explain why relatively little attention has been given to the question of state immunity within the context of the Arab League.

Nevertheless a convention has been adopted under the auspices of the League dealing with some aspects of state immunity, albeit in a very subsidiary way. As early as 1952, the Council of the League approved the Agreement regarding the Execution of Judgements⁸⁰ which was ratified by Egypt on 25 July 1954.⁸¹ This Agreement contains

a provision partially dealing with the general principle of state immunities in the context of foreign judgements rendered against a state party to the Agreement to whom a request for execution has been presented. Art. 4 provides:

This Agreement shall not, in any manner whatever, apply to judgements rendered against the government of the state requested to execute or any one of its officials in respect of work done by him on account of his official duty. Nor shall it apply to judgements, the execution of which will be contrary to international treaties and agreements in force in the state requested to execute.

It is clear from the words of the Article that the provisions of the Agreement cannot be pleaded to an action brought upon a judgement rendered in the territory of any other contracting party against the government of the requested state. Again, a judgement obtained against such governments would not be executed, if by its execution, a violation of an international treaty or agreement would consequently result. Thus a judgement of this kind is regarded as strictly territorial and not entitled to judicial recognition beyond the jurisdiction of the court which pronounced it. The legal value of judgements of this sort remains uncertain. It is only certain that such judgements can be used for diplomatic purposes or for other inter-governmental channels for non-judicial settlement. Therefore, in the final analysis, this provision recognizes the principle of state immunity, albeit with very restricted scope.

The provisions of the convention are commonplace and also outdated. They are modelled on the regime laid down by the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.⁸² The Arab League Convention deals only with the enforcement of judgments and arbitral awards and no reference is made to their recognition. The parties to the Arab League Convention are supposed to enjoy more favourable treatment because of their membership of a body which is essentially regional. To this extent, reliance on the provisions of the convention by private parties against state parties or their entities would not enhance the possibility of the enforcement of their judgements.

It should be mentioned that the Arab League Convention is being replaced by a new convention signed in Riyadh on 8 April 1983.⁸³ This new convention, unlike its predecessor, deals with enforcement of arbitral awards. It also avoids the double exequatur rule by recognizing enforcement without examining the merits of the case. The new convention sets forth the traditional conditions of i- arbitrability of the dispute; ii- the validity of the arbitration clause; iii- the proper notification of the parties and non-violation of public policy and moral rules of the place where the enforcement is sought (Art. 37). The award also must not violate the provisions of the constitution of the state where the enforcement is sought, or the tenets of Islamic law (Art. 30(9)). If the award has satisfied these conditions, it will be enforced without re-examining its merits by the courts. Most significantly, the provision dealing with non-enforcement of judgements against the government of the state where enforcement is sought was abandoned, thus paving the way for private parties seeking to enforce their awards against the governments of one of the contracting states and providing them with some security against an immunity plea.

The ratification of the 1952 Arab League Convention by Egypt does not appear to add anything new as far as Egyptian domestic law is concerned, since the provisions of the convention are strikingly similar to those of the civil and commercial code.

3. The Views of the Egyptian Government as Beneficiary of State Immunity Before Foreign Courts and Arbitral Tribunals

The views of the Egyptian Government towards the rule of state immunity can also be found in its pleadings when sued before foreign courts and arbitral tribunals. Belonging to this category of practice is the argument raised by the Egyptian Government before the Swiss Supreme Court in 1960.⁸⁴ In 1951, the plaintiff leased her villa in Vienna to the Egyptian Minister to Austria, who acted as the diplomatic representative of the Kingdom of Egypt in

Switzerland. The premises were to be used for mission purposes and as accommodation for the Minister. In 1957, the defendant terminated the lease on the ground that the tenant did not perform his obligations and claimed a certain amount of damages. To secure the resultant judgement, she applied for and obtained an order of attachment against funds of the Republic of Egypt deposited in a Geneva bank. In an attempt by the Swiss Embassy in Cairo to serve the garnishee order together with the order of payment on the Egyptian Government, the latter's foreign office refused to accept service or to be forwarded the papers by arguing that the order of attachment and execution violated the immunity of the Egyptian state. Later, in May 1959, the Swiss Embassy in Cairo certified that it had attempted service and the Geneva execution office accordingly found that the order of payment had not been challenged by the Egyptian Government, and transformed the original garnishee order into a definite order of attachment.

In the spring of 1959, the tenant evacuated the villa. During the interim, the owner had increased her claim against the tenant, as the result of an expert survey of the building and furniture, and had succeeded in obtaining an additional amount and a subsequent order of attachment. Service was again attempted and likewise opposed by the Egyptian Government. The order of attachment was directed against the funds which were designed to cover security and the purchase price of war materials which Egypt had concluded the purchase of in 1953 with a Geneva Corporation.

Before the Supreme Court of Switzerland, the United Arab Republic sought to set aside the order of attachment on the grounds that it had not been properly summoned and that the suits by the landlord violated the immunity of foreign states from local jurisdiction and execution. The court rejected these arguments. As to the nature of the rule of state immunity, the court observed:

According to the established jurisprudence of the Supreme Court, the rule of immunity from suit is not an absolute rule of general scope. A distinction must be made according to whether the foreign state acts by virtue of its sovereignty (jure imperii) or as a party under private law (jure gestionis). Immunity from suit can be claimed only in the

former case. In the latter case, the foreign states can be sued in the Swiss courts and subjected to measures of execution, provided that the legal relation involved has a territorial connection with Switzerland 85

The court cited a number of authorities, both judicial and doctrinal, from various legal systems as guidance. Perhaps the most interesting point in this part of the judgement was that the court had cited the practice of the Egyptian courts, both before and after the abolition of the Mixed Courts, to the effect that immunity of states from suit is limited to acts of government.

In order to determine the character of the act involved, the court looked to its nature and held that the transaction in that case had all the characteristics of an agreement between private parties: "... the obligations of both parties resulted from private law, and the parties understood this so well that they agreed to submit their dispute to ordinary civil courts".⁸⁶ "... when signing the lease it acted like any private individual renting real estate".⁸⁷

As far as immunity from execution was concerned, the court rejected the argument by observing that immunity from execution is confirmed by courts and writers only when there is immunity from suit, a view which was not adopted by the Swiss courts. Again the court based this absence of immunity from execution on the ground that powers of execution are the natural consequence of the power to adjudicate. The court also rejected the Egyptian argument that the purpose for which the funds were deposited was to finance the purchase of weapons from the Swiss firm as an act of national defence. The court found that the firm was already dissolved and the fund was ultimately to be used to settle the Egyptian obligations under the contract with the liquidators. A sizeable balance remained after the settlement and became available to any other use the Egyptian Government might desire. It may be remarked in the first place that the argument of the Egyptian Government that the plea of state immunity is available to foreign states against suits before foreign courts is incompatible with its judicial practice, as the court has rightly noted, and runs counter to its

governmental practice which has always been in favour of restricted immunity and, as such, cannot be justified from a legal point of view.

Secondly, the argument that the funds were used for the purpose of national defence seems to be a valid argument. However, the generality of the argument failed to take into account the circumstances under which the deposit was made and the consequences which followed the dissolution of the firm with which the government was dealing. If funds remaining available after settlement of the obligations under the contract with the Swiss firm had been converted into funds of the Egyptian Embassy in Switzerland or any other diplomatic mission, there might have been some grounds for invoking immunity, but funds deposited by the Egyptian Central Bank in Switzerland or in any other foreign state would entirely fall outside the ambit of immunity, and would thus be used for the specific purpose of satisfying a judgment or a creditor's interest. The conversion of funds held by the Central Bank of Egypt into accounts of its diplomatic missions abroad would protect those funds against measures of execution at least in such jurisdiction as held funds of diplomatic missions to be immune, such as Britain and Germany.

The participation by Egypt in international commercial arbitration has also resulted in a number of cases in which Egypt has maintained the plea of state immunity vis-a-vis the jurisdiction of the arbitral tribunals themselves. A couple of cases merit close attention.

The first of these is the Pyramids case.⁸⁸ A United States company had concluded an agreement in 1974 with a public body, the Egyptian General Organization for Tourism and Hotels (EGOTH), for the construction by that company of a large tourist complex near the site of the Pyramids. The United States company had demanded the Egyptian Government's signature on the contract and the signature had been given by the Egyptian Minister of Tourism, preceded by the language "approved, agreed and ratified". Later on, the plateau of

the Pyramids was classified by the competent administrative authority as being in the public domain of antiquities and accordingly the project raised a general outcry and the Egyptian Parliament ultimately blocked its implementation, even although the United States company had already spent large amounts of money on preliminary studies. In 1983, the case was brought before the arbitral tribunal of the International Chamber of Commerce (ICC). Egypt objected to the ICC jurisdiction, maintaining that it was not a party to the supplemental agreement and that it had not signed any agreement containing an ICC arbitration clause. The Egyptian Government signed terms of reference and participated in the arbitration, while maintaining its objection to jurisdiction. Nevertheless, the arbitration tribunal⁸⁹ ruled that the Egyptian Government was bound by the contract and had implicitly waived its immunity from jurisdiction. The Egyptian Government had then requested the Court of Appeals of Paris to set aside the arbitral award, which the court had done in 1984, stating that the Minister's signature was not a contractual commitment of the Egyptian state but merely approval of various administrative authorizations within the Minister's competence. The decision also accepted the Egyptian argument by ruling that, where a party objects to ICC jurisdiction, it may still participate in the arbitration (sign terms of reference etc.) without risking being considered to have waived its jurisdictional immunity. The decision of the Court of Appeal to set aside the award was rendered on the same day that leave to enforce the award was granted by a court in the Netherlands.⁹⁰

It may be observed first of all that cases in which parties to arbitration may have recourse to ordinary courts of law are inevitable in order to solve some problems that might arise during arbitration procedure. The significance of this need becomes more crucial if a state party to arbitration objected to the jurisdiction of the tribunal as Egypt had done in this case. Again the desirability of this recourse seems most important, especially if one considers that the absence of supervision by the judicial authorities amounts to saying that there could be no appeal against any arbitral award that might be rendered. In this way the

judicial supervision by the local court offers, as in this case, some comfort to the state party to the dispute which could request a national court to provide it with guarantees against particularly serious risk. To this extent it would be a mistake to say that such an intervention by the national courts would be incompatible with the "free will" of the parties. Once the parties have bound themselves to a given arbitration centre in a given country, it would be difficult to rule out the natural consequences of the supervision by the local courts.

In the second place, the participation in the proceedings by the Egyptian Government might well be interpreted to constitute a valid waiver of immunity from the tribunal's jurisdiction. To this, the Paris Court of Appeals seemed to reply that Egypt has an undeniable legitimate interest in defending the case before the tribunal.

Finally, the most negative aspect of the case was the argument of the Egyptian Government that it had not waived its immunity from jurisdiction and the acceptance of that argument by the court. It is not clear from the report on what grounds the court presumed the absence of such waiver of immunity. However, it is evident that, when the Egyptian government expressly ratified the arbitration agreement, it also expressly admitted the need for an arbitral institution, but did it not also implicitly subscribe to the rules of international business, which quite rightly include arbitration? If that kind of argument is allowed to prevail, serious concern may be raised about the efficacy of the arbitration system itself.

The same line of argument has been adopted by the Egyptian Government vis-a-vis the jurisdiction of another ICC arbitration, in the context of a particular type of multi-party arbitration resulting from an industrial contract involving Egypt and three Arab states.⁹¹ On 29 April 1975, the sovereign states of United Arab Emirates, Saudi Arabia, Qatar and the Arab Republic of Egypt, concluded an agreement by which the Arab Organization for

Industrialization (AOI) was established. On 27 February 1978, the AOI entered into an agreement with the claimant, Westland Helicopters Ltd., an English company registered under English law, to create a joint stock company of which AOI had 70% of the shares and the claimant the remaining 30%, as a result of which the Arab British Helicopters Co. was to be created to carry out quality control on, and sell helicopters manufactured by the claimant. On 4 January 1978, the committee established by the interested four states concluded with the British Government a memorandum of understanding, especially designed to guarantee the performance by the four states of their obligations towards the British company. In 1979, following the recognition of Israel by the Arab Republic of Egypt as a consequence of Camp David Accords between Egypt and Israel, the other three states withdrew from the organization which was later dissolved. Egypt, for its part, issued a law on 18 May 1979 which provided for the continuity of the organization as a legal person under Egyptian law.

In arbitral proceedings instituted in Geneva, the three Arab states chose to default, while the Egyptian representative raised a remarkable multitude of objections, challenging the jurisdiction of the ICC Court of Arbitration, inter alia, on the ground of Egyptian sovereign immunity. The tribunal preferred on its own motion to examine the argument also in relation to the other three defaulting states. The tribunal found that it was necessary to distinguish between 'adjudicative immunity' and 'enforcement immunity' and, due to the nature of the proceedings, only the former was discussed. Then it was ruled that:

According to a view accepted in Switzerland [the place of arbitration], as elsewhere, the signing of an arbitration clause implies the waiver of this ground. The 4 states in creating the AOI, whose obligations were binding on themselves, could not have overlooked the possibility of being proceeded against at law in respect of these obligations. The creation of AOI therefore implies a waiver of immunity in respect of obligations entered into by AOI. 92

The tribunal rejected all the objections raised by the respondent and declared itself competent. Egypt had also instituted proceedings for the annulment of the award given by the tribunal.

Undoubtedly the case had raised some complex legal problems which were further complicated by the sensitive political issues involved, since it was clear that the decision of the other three states to put an end to the existence of the AOI was a decision issued in response to the summit conference of Baghdad following the Egyptian recognition of Israel and, therefore, constituted, as it did, a primarily political decision which could simply be claimed to constitute an act of states. However, the regrettable dilatory tactics adopted by the advisors of Egypt in that case were hardly compatible with normal international practice in the field of commercial arbitration.⁹³ It was observed by an expert in this field that "all possible techniques were utilized to prevent the arbitral tribunal from adjudicating the jurisdictional issue" and concluded that "whatever the political or other motives may have been for the defence, the tactics employed should be vigorously condemned".⁹⁴

The resort by Egypt to the defence of sovereign immunity against the adjudicative jurisdiction of the tribunal raised at the outset the question why Egypt had accepted the arbitration proceedings in the first place. Was it not because of their expediency, neutrality and confidential character? How can any investment dispute be successfully resolved by arbitration proceedings if a state party to the arbitration can somehow raise the plea of sovereign immunity and thus frustrate the very object of arbitration? With an arbitration clause, the contract will be entered into with confidence since the private parties will be assured that the commitment assumed will be enforced irrespective of the sovereign capacity of the other partner. It is hard to imagine the existence of such confidence if a state party is allowed to raise jurisdictional immunity to avoid the very competence of the arbitral tribunal sitting pursuant to an agreement contained in a contract between a state and a private investor.

It has been correctly observed by Judge Schwebel that the plea is inadmissible. He has analyzed the issue in the following words:

A state is entitled, in certain restricted circumstances, to plead immunity from suit against it which is maintained in the courts of another state, on the principle par in parem non habet imperium. But the principle that one sovereign shall not judge another without the latter's consent cannot apply to proceedings before an arbitral tribunal which is an instrument of the sovereignty of no state; one sovereign is not sitting in judgment upon another. 95

This analysis has also been supported by other international lawyers,⁹⁶ who maintained that in an international arbitration to which a state is a party, by virtue of having entered into a valid and effective arbitration agreement, such a defence is unavailable.⁹⁷ If the plea of sovereign immunity was allowed to prevail in this case, that would render nugatory the existence and effectiveness of the whole machinery.

In the light of these observations, it was rightly maintained that these tactics can hardly "... enhance the credibility or prestige of Egypt or to further that country's efforts either to attract new investment or to build up Cairo as a centre for international arbitration".⁹⁸

It is not clear from the available material the actual position taken by the Egyptian Government in the above cases. Here the more general question may be asked: how is the position of Egypt in the preceding cases determined? To answer this question two possible explanations may be given. In the first place, if the Egyptian Government's view was dictated by the substantive law of state immunity in the forum state, i.e. that it enjoyed immunity from local jurisdiction and execution according to the governing municipal law of the territorial state, then there would seem to be no inconsistency at the legal level, for a state is perfectly free to invoke the municipal law of another state with a view to defending itself and protecting its interests. On the other hand, if the views articulated by the Egyptian Government were dictated by its appreciation that the restrictive doctrine of state immunity is not a general rule of international law, then an inconsistency would arise here.

How would such an inconsistency be construed and what would its significance be to Egypt's established position as to the international customary law of state immunity? There are obvious associated risks with the evaluation of this matter. Firstly, because of the confidential nature of most of the documents containing the legal arguments advanced on behalf of the Egyptian Government, it is doubtful if the position taken by Egypt in these cases should be accorded any high evidential value. The confidential nature of these documents will deprive the student of international law of the necessary details which explain the practical aspects of the legal position taken before a foreign tribunal.

Secondly, legal advisers may either intentionally or unintentionally express views which run counter to the practice of their own governments. This is neither wrong nor unnatural in itself, since it is part of their task to look at the day-to-day work from the point of view of the stable permanent interests of their countries and, against this background, formulate their views on controversial or unsettled legal points. More significantly, it is highly relevant to take into account the context within which the governmental view is announced. A concise expression of this point of view is offered by the most authoritative Professor George Schwarzenberger:

... Due regard must be paid to the context in which views are expressed. For what is said in an answer to an inconvenient question in a national code or stated in pleadings before an international court may differ considerably from replies to a questionnaire on a topic is that are likely to be covered by a codification conference. 99

Thirdly, it is true that the conditions of uniform practice require that the instances of practice of individual states, and of states in general, circumscribe, apply, or refer to, and thereby express, the same customary rule.¹⁰⁰ Yet it has been pointed out that some instances of inconsistent practice may well be inevitable. The very heterogeneity of the various types of state practice

involves the possibility of different pictures of the one rule when applied by different bodies on different occasions. Moreover, the changing circumstances surrounding the application may bring about some inconsistencies, as the ICJ pointed out in the 1951 Fisheries case:

Too much importance need not be attached to the few uncertainties or contradictions ... They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812. 101

However, further studies need to be made to see how far the national legal advisers' view corresponds to the ideological position taken in the state practice of their respective countries in other quarters.

In the light of these considerations, the problem of explaining the probative value of the views of the Egyptian Government when sued before foreign tribunals becomes somewhat more manageable. To plead sovereign immunity from suit for breach of contract or vis-a-vis the jurisdiction of arbitral tribunal does not, in and of itself, undermine the opinio juris of the Egyptian state on the customary rule of state immunity, which is firmly established from the country's judicial, treaty and other governmental practice on the subject.

III. STATE IMMUNITY IN EGYPTIAN DOMESTIC LAWS

1. Enforcement of Foreign Judgements

Apart from convention and treaty arrangements, the enforcement of a judgment of a foreign court in Egypt is governed by Egyptian domestic law.¹⁰² The domestic legal position relies to a large extent on the notion of reciprocity. The Egyptian court will enforce a foreign judgment subject to the same conditions of the court of the other country involved. Accordingly, a foreign judgment may be enforced in Egypt, without re-trial or examination

of the merits of the case, subject to the following:

- i- the foreign courts offer reciprocal treatment to judgments obtained in the courts of Egypt. If such reciprocal treatment is not offered by the court where the judgment is obtained, then the Egyptian courts will re-examine the merits of the case in the same manner as that adopted by such courts;
- ii- the courts of Egypt are not competent to hear the dispute which constituted the object of the foreign judgment while foreign courts are shown to be competent to hear the dispute in accordance with their respective laws;
- iii- the parties to the dispute were notified and properly represented in the proceedings;
- iv- the foreign judgment is final and conclusive according to the foreign law; and
- v- the foreign judgment does not conflict with prior Egyptian judgment in the same case and is not contrary to public policy or morality in Egypt.

If the foreign judgment satisfies the conditions set up in the legislation, then the judgment will be enforceable irrespective of the sovereign authority of the entity against whose assets the enforcement is sought. Public entities and their properties do not enjoy in the courts or under Egyptian law, any right of immunity from suit, set-off, attachment or execution of a foreign judgment, irrespective of the obligation incurred. Accordingly a person in whose favour a foreign judgment was made against the Egyptian state or one of its public entities must apply for an order to enforce the judgment (the *exequatur*) and, upon that application, the judgment will be examined to ensure that certain conditions have been fulfilled without the fear that immunity might be raised to prevent the judgment being enforced, since it is the established practice of Egyptian courts that states and their organs do not enjoy immunity in respect of their commercial transactions.

Egypt has also entered into two treaties with western states for reciprocal enforcement of judgments, namely France and Italy.¹⁰³ These treaties contain provisions dealing with enforcement which

should take precedence over the conditions contained in the Code of Civil and Commercial Procedure. But certain judgments are excluded from the effect of the treaties, such as judgments dealing with bankruptcy and composition with creditors. The treaties set out the conditions for enforcement and provide that enforcement may be refused if the judgment conflicts with public policy or the dispute is already the subject of a judgment in Egypt or of court proceedings. Once again the immunity from execution seems to pose no particular problem under the provisions of the treaties. However, legal practitioners were mindful of the fact that the benefit of the provisions of the treaties are only available to the nationals or legal persons established under the laws of the states party to these treaties and cannot be relied upon by holders of foreign judgments from elsewhere. Further, the provisions of the treaties, excluding judgments dealing with composition of creditors, may place the persons in whose favour a judgment was obtained in one of these countries at a disadvantage when it is opposed by a borrower from the Egyptian public sector. Such a person has to rely on other laws in order to enforce his judgment against a public entity borrower.

2. Immunity in Respect to Income Tax, Stamp Duties and Withholding of Taxes

It appears that foreign states are not immune from the jurisdiction of the Egyptian courts in respect of taxation for the revenue or income derived from the trading or commercial activities conducted within Egyptian territory. This attitude has been confirmed in the Egyptian answers to the UN Secretariat's questionnaire.¹⁰⁴ The same holds true, even if such activities are conducted through public companies, provided that either their "actual seat of management" or their "principal activities" are established in Egypt.¹⁰⁵

Art. 3 of the Tax Act of 1939¹⁰⁶ provides: "Foreign companies and enterprises operating in Egypt shall be treated as Egyptian

companies for the purpose of the application of this tax". The Tax Act has devised a separate criterion for the purpose of its application that the "foreign company operating in Egypt" are those companies, the sole purpose of which is to invest in Egypt. This provision is broad enough to include either foreign companies wholly belonging to a foreign government or other enterprises in which a foreign government holds shares, acquires equity or becomes a member in any other form. Moreover, the dividends payable on the shares of these companies are subject to tax on income realized in Egypt in any manner whatsoever, even indirectly. The generality of the words used, coupled with the absence of any reference to exemption of state-owned companies in the preparation work of these provisions,¹⁰⁷ tends to suggest that a foreign state cannot invoke immunity from the jurisdiction of the Egyptian Courts in a proceeding relating to the determination of its rights and obligations arising from its shareholdings in a company, provided that one of the two substantial connections, namely, "the actual seat of management" or "their principal activity" is established in Egypt.

This interpretation is moreover in accord with the judicial practice of the country in denying immunities to a foreign state when engaged in commercial activities. This is understandable since Abdel Razzaq al-Sanhuri,¹⁰⁸ and the committee which put the Civil Code of 1948 together, had drawn extensively "on the decisions of the Egyptian courts, comparative legislation and the Sharia" as sources by which the code had been drafted.¹⁰⁹ al-Sanhuri himself declared, before a committee set up by the Senate: "I put it on record now that three quarters, or five sixths, of the provisions of this law are based on the decisions of Egyptian Courts and on the existing legislation".¹¹⁰

The rule of non-immunity is also applicable regarding stamp duty and other taxes. For example, the basic position regarding loan agreements as contained in the law governing stamp duty¹¹¹ is that, if the loan agreement is signed in Egypt, stamp duty is payable. The rate is four per mille on the amount of the loan.

It is the responsibility of the lender to pay the duty and he cannot, as a matter of public policy, shift the burden of payment onto the borrower. If the agreement is not signed in Egypt, duty will only become payable if and when the agreement is used in Egypt (Art. 7). This is defined to include any action which is designed to produce any legal effect. Therefore no stamp duty or any other documentary taxes or charges imposed by or in Egypt are payable on or in connection with an agreement so long as it is signed outside Egypt and is not used in Egypt to produce legal effect.

As a general rule of domestic tax, movable capital tax is payable on interest payments. The current rate is 32%, although this is reduced by the many double taxation treaties Egypt has entered into with Austria, Finland, Italy, India, Iraq, France, Japan, Norway, Sudan, Sweden, the UK and USA.¹¹² Most of these require that a foreign company must have a permanent establishment in Egypt for it to be subject to tax. Exceptions from this tax are enumerated with respect to companies formed under the Foreign Investment Law;¹¹³ and foreign currency loans made by foreign banks to the state or any of its departments or public sector organizations.¹¹⁴ All payments to be made by the borrower may be made in full without any deduction or withholding for, or on account of, any taxes, levies, duties or fees of any nature imposed by the Egyptian Government or any taxing authority therefor. However, in the case of disputes relating to any of such fiscal liabilities, the Egyptian Courts will be competent to hear the dispute irrespective of the identity of the defendants and at the same time will enforce the full payments to be made by the borrower who is not allowed to deduct any payable taxes or fees.

3. Immunities of State Ships

As far as Egyptian domestic law is concerned, there appears to be no text which formally grants foreign state vessels the immunity generally denied in judicial practice. As has been discussed earlier, the Mixed Courts had been consistent in denying immunities

to government ships in regard to their commercial activities,¹¹⁵ although the determination of the nature of the service of the ships in some cases had been somewhat less consistent.¹¹⁶ However, there are some provisions dealing with some specific aspects, in which vessels belonging to foreign states may be involved. It should be borne in mind that the generality of the language used in these provisions makes them equally applicable to both private and public ships. One of these legislations which regulates, among other things, the competence of the Egyptian courts in certain maritime cases, is Art. 19 of the Commercial Maritime Code of 1883 which provides:

Where a foreign ship comes into collision with a merchant man or where a merchant ship affords salvage services to foreign ships, any disputes which may arise therefrom shall be referred to the decision of the regular courts of justice.

The claim that such provisions could be interpreted to be equally applicable to foreign state-owned vessels can be corroborated by the fact that these legislative provisions were promulgated in 1883 to cope with the many problems created by the consular jurisdiction in Egypt, under which every consulate had nominated a judge for causes in which its ships had the role of the defendant.¹¹⁷ Indeed, if one speaks of capitulations and consular jurisdiction in Egypt, one generally has in mind the numerous claims of immunities from local jurisdiction made by the consuls of other states on behalf of their nationals and their property. This in fact was most characteristic of the consular regime in Egypt. It was precisely against this capitulatory background that the Maritime Code was promulgated, with the manifest object of reducing the scope and consequences of the prevailing immunities enjoyed by consuls, their nationals and property in Egypt.

4. Movables and Immovables

Apart from these, there are other provisions in the Egyptian civil code which could similarly be interpreted to apply to foreign governments. For example, according to Art. 18 of the civil code,

possession, title and other property rights in respect of movables and immovables are stated to be governed by the law where such property is situated. The interpretation that Art. 18 applies equally to foreign states can be supported by the fact that other provisions of the code placed in the chapter of persons and concerning their civil rights are applied to the Egyptian Government as well. Again under the terms of Act No. 81 of 1976,¹¹⁸ foreigners may acquire movable or immovable property under certain circumstances, whether by way of purchase or inheritance. In the absence of any limitation to the contrary, this would permit real actions asserting ownership or possession of movables or immovables claimed by foreign governments, and personal action against a foreign head of state as heir or devisee of an estate or as a participation possession or ownership in any other form.

References - Chapter Four

1. Apart from the work undertaken by the UN International Law Commission since 1978 which was designed to codify the customary rules on the subject.
2. For the history of the convention, see Oppenheim, International Law, 8th ed. (1955), Vol. I, p.858, n.1; Sucharitkul, op. cit., p.92; Louis Frank, "A New Law of the Sea: Further Progress", LQR, 42 (1926), 308-16, and 33-34; C.I.M. Bulletin, No. 74, Sept. 1925. For a discussion of the provisions of the convention, see Sir William (Lord) McNair, "Legal Aspects of State-Shipping", Trans.Gro.Soc., 34 (1949), 31-53.
3. Text in LNTS, CLXXVI, 199.
4. Text, ibid., 214.
5. Article 3, para (1) of the convention.
6. Art. 1 read with Art. 2.
7. See Art. 11 of the convention.
8. See UK International Convention for the Unification of Certain Rules concerning the Immunities of State-Owned Ships (Brussels, 10 April 1926, with Supplementary Protocol, Brussels, 24 May 1934) [Cmnd. 7800] (London: HMSO, 1980).
9. For the text of the convention, see UNTS, 516 (1964), 205, entered into force on 10 September 1964, in accordance with Art. 29.
10. The case of the Parlement Belge was decided on this principle. The argument of the Solicitor-General that the trading by the ship was not a private trading by the king for his own benefit but part of the public employment of the vessel for the benefit of the state, was accepted by the Court of Appeal. It should, however, be noted that the public-use-post was based on a convention between the UK and Belgium.
11. Conventions of the High Seas, 29 April 1958; text in UNTS, 450 (1963), 11.
12. See Mr Sucharitkul, YBILC (1984), Vol. II, Part One, 49, esp. para. 210.
13. See Official Records of the Third United Nations Conference on the Law of the Sea, XVII (UN Publications, Sales No. E.84.V.3), 151, Doc./A/CONF.62/122.
14. See the Law of the Sea Bulletin (UN Office for Ocean Affairs and the Law of the Sea, 1987), special issue 1 (March 1987);

see also Multilateral Treaties deposited with the Secretary General, Status as at 31 December 1984 (UN Publication, Sales No. E.81.V.9). The ratification is also accompanied by a declaration concerning: the establishment of the breadth of its territorial sea; the passage of nuclear-powered ships through the territorial sea; the passage through the Strait of Tiran and Gulf of Aqaba; the exercise of rights in the exclusive economic zone and declaration concerning the procedure chosen for the settlement of disputes contemplated in Art. 297 of the convention.

15. The text of the Final Act and the annexed resolutions is published in UNTS, 500 (1964), 212. The convention entered into force on 24 April 1964 in accordance with Art. 51. For the proceedings of the conference which adopted the convention, see UN Conference on Diplomatic Intercourse and Immunities, Official Records, Vols. I and II (Un Publication, Sales Nos 61.X.2 and 62.X.1).
16. See YBILC (1958), Vol. II, 95.
17. See AJIL, XX (1926), Supp., 149.
18. J.L. Hardy, Modern Diplomatic Law (Manchester: University Press, 1968), p.9.
19. YBILC (1958), Vol. II, 94-5.
20. See commentary on Draft Art. 20, para. (4), in the Report of the ILC covering the work of its tenth session, YBILC (1958), Vol. II, 78, at 95, para. 4.
21. See the statement of Sir Gerald Fitzmaurice in YBILC (1957), Vol. I, 53, para. 19.
22. Art. 27(3).
23. "..... that para. 2 of Article 27 shall not apply", see Multilateral Treaties, op. cit., pp.51-3; thereby denying immunities for other categories of mission staff enumerated in the paragraph. Egypt had also made a declaration that its ratification of the convention did not imply recognition of Israel. However, a notification was issued on 18 January 1980 by Egypt to the effect that it had decided to withdraw its reservation relating to Israel. For the text of the reservation, see UNTS 500 (1964) 211. The decision to withdraw the reservation was probably due to the conclusion of the Camp-David Treaty between Egypt and Israel of 1978; text in US Policy Statement Series, 1978 and the conclusion of the Peace Treaty between these states on 26 March 1979.
24. Text in UNTS, 596 (1967), 551, adopted by a conference on the basis of Draft Articles prepared by the ILC. For the proceedings of the conference, see UN Conference on Consular

Relations, Official Records, Vols. I and II (UN Publication, Sales Nos. 63.X.2 and 63.X.1).

25. See Multilateral Treaties Deposited, op. cit., p.69.
26. See Arts. 31-35 of the convention.
27. A grounded Liberian supertanker which poured 120,000 tons of heavy crude oil onto a hundred miles of British and French coastline in March 1967.
28. For the text of the convention, see ILM, 9 (1970), 45.
29. Art. 1(1) of the convention.
30. Forty-eight states attended as voting participants, and six more states, six non-governmental bodies, and four UN and inter-governmental agencies were present as observers. For the proceedings of the conference, see UN Publication, LEG/CONF/C.1/1, Official Records.
31. UNTS, 575 (1966), 159.
32. See Ibrahim Shihata, "Towards a Greater Depoliticization of Investment Disputes: the Roles of ICSID and MIGA", ICSID Rev.-FILJ, I (1986), 4.
33. An exhaustive bibliography on ICSID appears in ICSID Rev.-FILJ, ibid., 454-64.
34. This has been acknowledged by the Court of Appeal of Paris in the case of Benvenuti et Bonfant v. Gouvernement de la Republique du Congo, ILM, 20 (1981), 878; See also Delaume, op. cit., pp.796-800.
35. For further discussion, see Georges R. Delaume, "ICSID and the Transnational Financial Community", ICSID Rev.-FILJ, I (1986), 250.
36. See Delaume, "ICSID Arbitration and Courts", AJIL, 77 (1983), 800.
37. See Delaume, "The ICSID and the Banker", Int.Fin.L.Rev. (October 1983), 11-12.
38. In cases of failure to comply with the award, the right of diplomatic protection is suspended from the date of consent to ICSID arbitration until an award is rendered. Again failure to comply would give the right to the contracting state to bring action in the ICJ against the defaulting state; see Art. 64 of the convention.
39. Law No. 97 of 1983.

40. For instance, the loan agreement between Samuel Montagu and the Ministry of Housing and Land Reclamation for the supply of UK goods and services for the rebuilding of the Cairo sewerage system was published in the official Gazette on 9 June 1983.
41. See Stern, "Trois arbitrages, un mem probleme", Rev.Arb. (1980), 3; see also Chafik Muhsin, "Egypt", JIA, 2 (1985), 11.
42. Done at New York on 10 June 1958 and entered into force on 7 June 1959 in accordance with Art. XII. Text in UNTS, 330 (1959), 3. The policy behind the convention to achieve an efficient resolution of international business disputes has sufficiently been explored by Dr A.J. Van den Berg's leading treatise on the convention, New York Convention 1958 (New York, 1981).
43. See "Multilateral Treaties Deposited with the Secretary-General", op. cit., p.611; see also UNTS, 330 (1959), 38.
44. See Georges Delaume, op. cit., ICSID Rev.-FILJ, I (1986), 249.
45. See, e.g., the decision of the Cairo Court of Appeal of 5 May 1981, Case No. 42, and the decisions of the Alexandria District Court of 17 August 1982, Case No. 97. In both cases the enforceability of foreign arbitral awards in Egyptian courts was endorsed.
46. See Int.Fin.L.Rev. (July 1986), 30. The enforcement of foreign judgements in Egyptian courts will be discussed at a later stage.
47. See, e.g., the decision rendered by the court of Port Said, December 1984, in the case of Mohafazat Port Said and the Suez Canal Company v. Rolaco Holdings.
48. See the decision of the court of Cairo South, November 1983, in the case of MITOB v. SNTF.
49. The centre has been established in Cairo in pursuance of a decision adopted by the Asian-African Legal Consultative Committee on 23 January 1978 at its 19th session held at Doha, as a part of the Asian-African Legal Consultative Committee's integrated disputes settlement scheme in the economic and commercial field. For a brief account of the centre along with its Statute and Rules of Arbitration, see "Arbitration under the Auspices of the Cairo Regional Centre: Introduction and Rules", ALQ, 2 (May 1987), Part 2, 183-97.
50. See Al-Ahram, 3 November 1985, p.12.
51. See, e.g. the view of Mr Sigvard Jarvin, General Counsel to the Court of Arbitration of the ICC (Paris) in "The ICC Court of Arbitration: Recent Developments and Experience related to Arab Countries", ALQ, I (1985-86), 280-98, at 297-8, who observed

that the parties when agreeing to ICC arbitration accept all the aspects of the ICC rules, including the appointment mechanism laid down in Art. 8 thereof.

52. Ibid., 298.
53. Text in UNTS, 687 (1969), No. 9824, 221.
54. See, e.g., its treaty with Ghana; UNTS, 655 (1969), 171.
55. Text in Treaties to which Egypt is a Party (Cairo: Government Press, 1986), p.64 (in Arabic).
56. Unofficial translation.
57. For example, the 1958 Geneva Convention on Continental Shelf formally recorded and codified the assertedly customary international law. The states parties to the High Seas Convention expressly declared in its preamble their desire "to codify the rules of international law relating to the High Seas" and recognized that the United Nations Conference on the Law of the Sea held at Geneva for that purpose in 1958 adopted the provisions of that convention "as generally declaratory of established principles of international law". See U.N. Doc. A/Conf. 13/L.52-L.55. The other three conventions adopted by the U.N. Conference on the Law of the Sea, 29 April 1958 "provide evidence of the generally accepted rules bearing on their subject matter". See Ian Brownlie, Basic Documents in International Law (Oxford: Clarendon Press, 1983), 3rd 3d., p.85.
58. ICJ Reports (1950), pp.277 et seq.
59. Ibid. (1969), p.42, para. 73.
60. Thirlway, International Customary Law, supra, pp.59, 67.
61. BYBIL, 41 (1968), 293; although the same author qualified his view two years later when he stated that the number of parties was highly relevant only in the case of declaratory, but not law-making, treaty rules, see Baxter, R.C., op. cit., Vol. 129 (1970), p.64.
62. See Professor Detley Chr. Dicke, "The Heleanna Case and International Lawmaking Treaties: A New Form of Concluding a Treaty", AJIL, 69 (1975), pp.624-8, at p.627.
63. Bin Cheng, International Law Teaching and Practice (London, 1982), p.224, where he distinguished between opinio juris and opinio obligationis.
64. Abdul Aziz Sirhan, The Rules of Public International Law and Egypt's Practice (Cairo, 1971), p.87 (in Arabic).

65. See YBILC, (1979), Vol. II, Part Two, 186, paras. 174, 183. At the request of the Commission, the legal counsel of the United Nations circulated, on 18 January 1979, a letter to member states inviting them to submit relevant materials on the topic, including national legislation, decisions of national tribunals and diplomatic and other correspondence.
66. The questionnaire was circulated with the letter of the legal counsel of 20 October 1979. This and the above-mentioned requests were renewed by the letter of the legal counsel of 3 October 1980.
67. See the Special Rapporteur's Preliminary Report, YBIL (1979), Vol. II, Part One, 235, esp. para. 38.
68. For the text of the questionnaire and the answers, see Materials on Jurisdictional Immunities of States and Their Property, *op. cit.*, 557-9, 569-71 respectively.
69. Reply to question 1.
70. See his Preliminary Report, Doc.A/CN.4/723, YBILC (1979), Vol. II, Part One, 233, paras. 29, 31; Fourth Report, Doc.A/CN.4/357, *ibid.* (1982), Vol. II, Part One, 214, paras. 60-1; Sixth Report, *ibid.* (1984), Vol. II, Part One, 41, para. 173.
71. UNGAOR, 34th Session (1979), 6th committee, 51st meeting, para. 29 and see also *ibid.*, 35th session, 56th meeting, para. 73.
72. *Ibid.*, 37th session, 1982, 50th meeting, para. 9.
73. The committee was originally constituted by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria as from 15 November 1956, to serve as an advisory body of legal experts. The statute of the Committee was amended on 19 April 1958 so as to include the participation of African countries. Accordingly, the name of the committee was changed to the Asian-African Legal Consultative Committee. The relatively wide scope of the consultative committee's authorization is discussed in a note by Robert R. Wilson entitled "A Decade of Legal Consultation: Asian-African Collaboration", AJIL, 61 (1967), 1011-5.
74. The Colombo session was attended by delegations of the governments from Burma, Ceylon, India, Indonesia, Iraq, Japan, Pakistan, UAR (Syria and Egypt) and a representative of the Iranian Government.
75. For the text of the questionnaire and the discussion that followed, see Annexure "A" to the Report on Immunity of States in respect of Commercial Transactions entitled: Summary of Discussions on State Immunity on the Basis of a Questionnaire prepared by the Secretariat, Asian-African Legal Consultative Committee, 2nd session, Cairo, October 1 to 13, 1958, issued by

the Secretariat of the Committee at New Delhi, undated, pp.32-41.

76. For the answers, see Rev.Egy.Dro.Int., 14 (1958), Annex 'A', 74-9.
77. It should be recalled that no reference in the Egyptian memorandum was made to the basis of the differentiation between private and public assets of the foreign states.
78. The Pact of the Arab League was adopted at Cairo on 22 March 1945. The translation is that of the Arab Office (Washington, DC), 1945. The term 'covenant' instead of 'pact' has been used in other translations; see, e.g., the translation of the Arab Office (London), 1945.
79. See the Legal Committee's Report 1986, The League of Arab States, Secretariat-General, Tunisia, D.AA/L.VI/86.
80. The Agreement was approved by the Council of the League on 14 September 1952, during its 16th ordinary session. It was signed by Egypt, Jordan, Lebanon, Syria, Saudi Arabia, Iraq and Yemen. The (Arabic) text may be found in the Collection of Conventions and Treaties, League of Arab States (Cairo: The Arab League Secretariat-General, 1978), 721-3.
81. The instrument of ratification was deposited at the Secretariat-General on the same date; ibid., 72.
82. Text in LNTS, XCII, 301.
83. The convention on Judicial Co-operation between States of the Arab League, signed by Syria, Lebanon, Jordan, Kuwait, Iraq, Libya, UEA, Bahrain, Saudi Arabia, Qatar, Oman, Northern Yemen, and the Democratic Republic of Yemen. See the Collection of the Treaties concluded under the Auspices of the Arab League (Tunisia, 1985), No. 256, 1049.
84. Republic Arab Unie C. Dame X, the decision of the Supreme Court of Switzerland, 10 February 1960, translated in AJIL, 55 (1961), 167-71.
85. Ibid., 168.
86. Under the contract any disputes arising from the lease were to be decided by the Civil Court of Zurich.
87. Republic Arab Unie C. Dame X, AJIL, op. cit., 169.
88. See Arab Republic of Egypt v. Southern Pacific Properties Ltd. et al. (1984), ILM, 23, No. 5 (September 1984), 1048, for the decision of the Cour d'Appel, Paris, which was confirmed by the French Cour de Cassation on 6 January 1987, ILM, 26, No. 4 (July 1987), 1004-7.

89. The tribunal was composed of G. Bernini, Italy, Chairman; A. El Ghatit, Egypt and M. Littman, QC, UK co-arbitrators; Mr A. El Ghatit of Egypt dissenting.
90. Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, District Court of Amsterdam, Judgement of 12 July 1984, ILM, 24 (1985), 1048.
91. ICC Court of Arbitration: Interim Award Regarding Jurisdiction in the Arbitration between Westland Helicopters Ltd. and the Arab Organization for Industrialization, United Arab Emirates, Saudi Arabia, Qatar, Egypt, Arab British Helicopters Ltd., 5 March 1984, ILM, 23 (1984), 1071; Swiss Arbitration Bulletin No. 4, 203.
92. See ibid., at 1089.
93. See Pierre Lalive, "Some Threats to International Investment Arbitration", ICSID Rev.-FILJ, I (1986), 33.
94. See Professor A. El Khosheri, in a paper delivered in December 1984 at the ICC Institute of International Business Law and Practice.
95. Stephen M. Schwebel, International Arbitration: Three Salient Problems (Cambridge: Grotius Publications Ltd., 1987), p.122.
96. See, e.g., J. Gillis Wetter, "Pleas of Sovereign Immunity before International Arbitral Tribunals", JIA, 2 (1985), 7-9, 10.
97. Ibid., 14.
98. Pierre Lalive, op. cit., p.33.
99. International Law, op. cit., Vol. I, 3rd ed., p.36.
100. See the Asylum case, ICJ Reports (1950), p.276. Cf. The North Sea cases, ibid. (1969), p.43, para. 77.
101. ICJ Reports (1951), p.138.
102. Arts. 296 and 301 of the Egyptian Code of Civil and Commercial Procedure.
103. For the text of these treaties, see the Collection of Treaties, to which Egypt is a Party (Cairo: Government Press, 1986), Vol. 1, pp.127, 141 (in Arabic).
104. See Sec.3(i) supra.
105. Unofficial translation quoted from an article by Ibrahim Shihata in Rev.Egy.Dro.Int., 27 (1971), 121.
106. As amended by Legislation No. 39 of 1941, and No. 34 of 1976.

107. See al-Qanun al-Madani: Majmu'at al-'Amal al-Tahdirrya, Vol. I, p.256.
108. Who is often regarded as the chief architect of the Egyptian Civil Code of 1948.
109. al-Qanun, op. cit., pp.20 and 159.
110. Ibid., p.70.
111. Law No. 111 of 1980.
112. The text of these treaties is published in Arabic in The Collection of Treaties, op. cit., Vol. II.
113. Law No. 34 of 1974, Art. 8. The aim of this enactment is to encourage foreign investment by way of transfer of capital and/or technology. To achieve this, tax privileges and exemption from certain Egyptian law are therefore provided.
114. See the Income Tax Law, Law No. 157 of 1981, Art. 4(3).
115. See Captain Hall's case, supra.
116. Cf. Stapledon & Son's case; and Staglie Ho v. Taurill's case, supra.
117. See F. Morgous, The Egyptian Maritime Commercial Code (Cairo, 1978), p.97 (in Arabic).
118. Text in Collection of Egyptian Laws (Cairo: Government Press, 1978), Vol. III, p.19 (in Arabic).

CHAPTER FIVE

THE LAW OF STATE IMMUNITY AS REFLECTED IN SUDANESE PRACTICE

I. THE INFLUENCE OF THE COMMON LAW

In the Sudan there are no statutory provisions concerning state immunity and the judiciary has only sporadically entered that area which has largely been neglected by scholarly opinions. In rendering an account of the Sudanese law concerning the subject, there is thus very little to draw upon.

In dealing with the contribution of the Mixed Courts to the development of the law in Egypt, it has been noted that the nationalities of the judges, the large foreign population and the growing number of commercial cases have played a major part in bringing home to Egyptian law the doctrine of restrictive immunity. This, however, is certainly not the case in the Sudan, where the capitulations were inapplicable as there was no foreign population nor consular jurisdiction. The Condominium Agreement of 1899¹ expressly excluded the operation of the capitulatory rights in the Sudan. Unless a distinct separate agreement was made, the drafters of the agreement found that the Europeans would assume that they were entitled to the same privileges and immunities to which they were entitled in Egypt under the capitulations.²

The divergence of this practice may be explained by the fact that the British Government feared that, if the capitulations had to be introduced in the Sudan, they might well be used as an umbrella by other European powers and their agents in the country, causing unnecessary difficulties to the smooth functioning of the joint administration in the Sudan.³ Such difficulties were a source of endless anxiety to the British authorities in Egypt. Lord Cromer was anxious to prevent Europeans acquiring in the Sudan the privileged status which was theirs in Egypt. Throughout his

Egyptian career, he had been hampered by the anomalies of the international status of the country, the nominal suzerainty of the Ottoman Empire, the control over Egyptian finances exerted by the European commissioners of Egypt's external debt and the enclaves of privilege derived by the consular authorities from the capitulations. The capitulations, however appropriate they might be for special reasons in Egypt, were certainly unsuited to the Sudan, where both commonsense and the rights acquired by conquest demanded a political and administrative system of a similar kind, but different from that applicable to Egypt. Lord Cromer stated that:

It was necessary to invent some method by which the new Sudan should be, at one and the same time, Egyptian to such an extent as to satisfy equitable and political exigencies, and yet sufficiently British to prevent the administration of the country being hampered by the international burr which necessarily hung on to the skirts of Egyptian political existence. It was manifest that these conflicting requirements could not be satisfied without the creation of some hybrid form of government hitherto unknown to international jurisprudence. 4

Art. V of the Agreement was drafted so as to prevent the commissioners of the debt from interfering in the finances of the Sudan and Art. VI to prevent foreigners from claiming rights under the capitulations in the following words:

In the definition by proclamation of the conditions under which foreigners, of whatever nationality, shall be at liberty to trade with or reside in the Sudan, or to hold property within its limits, no special privileges shall be accorded to the subject of any one or more powers.

Most significantly, the jurisdiction of the Mixed Courts of Egypt was stated in Art. VIII ".... not to extend, nor be recognized for any purpose whatsoever, in any part of the Sudan".⁵ This was expressly endorsed by the Mixed Courts themselves. The Mixed Tribunal of the first instance in Cairo affirmed this view in 1910.⁶

The distinction drawn in Art. X of the Agreement between the political status of Egypt and that of the Sudan was also an attempt on the part of the British Government to exclude interference of foreign powers in the affairs of the country. It was in this way

that the capitulatory regime of Egypt was made inapplicable to the Sudan and the jurisdiction of the Mixed Tribunals was also excluded. On the other hand, the reception of the common law in the Sudan since the beginning of this century⁷ has greatly contributed to the disregard on the part of the Sudanese lawyers of continental law and continental legal practice which played a significant part, as was the case in Egypt.

In both pre and post-independent Sudan, English common law precedents and rules were extensively referred to, without being described as foreign law.⁸ In almost all branches of the law, English common law was cited and relied upon. In the law of contract,⁹ law of tort,¹⁰ property,¹¹ constitutional and administrative law,¹² and the law of trust,¹³ English rules and statutes were applied without objection. Although English law has been deviated from in some cases,¹⁴ and other systems of law have occasionally been referred to,¹⁵ the fact remains that there was no radical change from the pattern and trend initiated earlier by the courts in the period before independence. National judges became acquainted with English precedents, English treatises and English judicial techniques and terminology, and the reliance upon English rules greatly increased. The same practice was followed as regards cases involving international law issues as will be seen later.

No serious thought appears to have been given during this period to the possibility of adopting or adapting the Islamic law. There seems to be no recorded explanation in the available literature for this attitude. The reason appears to lie in the fact that the national judges have inherited from their predecessors a judicial system within which resort to rules of Islamic law would be totally unthinkable. The situation remained as it was until recently when Islamization of the law was carried out in 1983. As in the Ottoman Empire and Egypt, the Shari'a Courts were confined to the personal and family law of the litigants, whether they were Muslims or not, provided that, in the case of non-Muslims, the parties "make a formal demand signed by them asking the court to entertain the question and stating that they agree to be bound by

the ruling of the Shari'a law".¹⁶ This resulted - as in India years before - in judges, trained in English law, largely importing the principles and precepts of English law, and even the decisions of English courts, as the most convenient expedient. It is not surprising therefore, that the then prevalent English law doctrine of absolute immunity found a fertile soil in Sudanese judicial practice as will be explained later. At present, and after the codification of most of the Sudanese law, legal precedents and rules of equity and good conscience still retained their importance as sources of law,¹⁷ but they are now superseded by the Shari'a law, being the main source of law by virtue of the Judgments (Basic Rules) Act 1983.¹⁸

Under the sources of the Judicial Decisions Act, both Sudanese precedents and rules of equity are recognized as valid sources of law to be applied in the absence of legislation on the dispute before the courts. Art. 3(b)(v) enables the judge, in the absence of legislation, to look for help from the Sudanese precedents, provided always that these precedents do not run counter to the rules of the Shari'a or the opinions of the majority of Muslim jurists.

Art. 3(b)(vii) enables the judge to seek "... the rules of equity as adopted by various noble divine legislations and the meaning of justice felt by good conscience". Whatever equity, justice and good conscience might have meant in the past, the meaning is now totally different because reference to the rules of equity under the new legislation does not mean equity in the sense of the repealed Sudanese enactments, Indian or English law. On the contrary, resort to equity rules is governed by a completely new concept of equity, namely: rules of equity recognized by other noble divine legal systems, i.e., the rules of Islam, and the rules laid down by other religions recognized by Islam such as Christianity and Judaism. Otherwise the judge may, as a last resort, employ the

rules of justice as felt by good conscience.¹⁹ What is more, under the Act, the rules of equity, justice and good conscience are relegated to the seventh and last source to which the judge may refer in the absence of express legislation. Needless to say, the promulgation of these new Acts has had the result of moving the Sudan away from its common law heritage and bringing its law closer to the dominant legal systems and the laws of Egypt and its Arab neighbouring countries.

The above brief survey shows how rules of English law were generally received and accepted by the Sudanese courts. The explanation becomes more evident in cases involving sovereign immunities decided by those courts. Whenever the issue of sovereign immunity was raised before the courts, the judges heavily relied upon applicable English rules. Although they agreed that English law was not binding on the Sudanese courts, they followed that law, rightly or wrongly, thus increasing the trend towards an absolute view of immunity. None of the decided cases referred to authorities other than English on the subject, and even when the latter were referred to, they were never distinguished as foreign cases.

II. JUDICIAL DECISIONS

The number of Sudanese judicial decisions on state immunity is rather limited - amounting to no more than five cases - some of which deal with immunity questions only marginally. Also, the judgements are all on the facts, since the Supreme Court had not so far had the chance to formulate a firm ruling in this matter.

The fundamental position of the courts has long been in favour of absolute immunity of foreign states from judicial process. As early as 1959, a case was brought against the Egyptian Irrigation Department.²⁰ The plaintiff in this action was a Sudanese car

driver once employed by the defendants, the Egyptian Irrigation Department situated in Khartoum. Following a dispute between the two parties, the plaintiff instituted a proceeding claiming arrears of pay from 1952. A summons was served on the defendants and, on their failure to appear, a default judgement was given in favour of the plaintiff. The defendants later appeared and asked the court to set aside the decree. They filed a statement of defence in which they rejected the claim on its merits without making any reference to the competence of the court. For some reason, the hearing of the case was adjourned until 1 December 1960. During this interval, the defendants decided to raise the question of jurisdiction, alleging that the department was an agency of the Egyptian state and, as such, was immune from suit. Consequently, the court framed the preliminary issues before it as follows: Did the Government of UAR submit to the jurisdiction of the Court? and, if so, can the submission be withdrawn?

The court started by observing that the reciprocal independence of states was one of the most universally recognized principles of international law; that no government could be subjected against its will to the jurisdiction of another, since the right of jurisdiction is inherent in its sovereignty. However, the court went further and stated that this immunity may be declined by way of express or implied waiver. In the opinion of the court, such waiver can be effective only if the sovereign power seeks the aid of the court as a plaintiff, or where, in answer to a summons, it appears as a defendant and without challenging the decision of the court, defends the action on its merits. On this point, the court referred to the English cases of Duff Development Co. Ltd. v. The Government of Kelantan and another (1924) and Mighell v. Sultan of Johore (1894), and approvingly cited Lord Esher that: "It is only when the time comes that the court is asked to exercise jurisdiction over him [the sovereign] that he can elect whether he will submit to jurisdiction".

The court found as fact that the defendants had received the summons, signed it, entered an appearance in the first hearing and

filed a detailed statement of defence. In the course of these motions, the defendants made no reference to their being immune from jurisdiction and it was only after the issues were framed that the incompetence of the court was raised. In view of these facts, the court held that "the Government of the U.A.R. had clearly and unequivocally submitted to the jurisdiction of the Court of the Sudan".

As to the second issue, the court ruled that, where the foreign government had itself submitted to the jurisdiction of the court, such submission is irrevocable as regards that issue, since "submission covers the proceedings up to the judgement stage and indeed up to the final appeal". An interesting point about this decision is that it has upheld the ruling that waiver of immunity by a foreign state enables the court to exercise its jurisdiction. According to this judgement, immunity, once renounced, cannot be reclaimed. Such waiver operates to preclude that state from denying the consequences of its own conduct and remains subject to all stages of the exercise of judicial jurisdiction "up to the final appeal". The use of these words by the court tends to suggest that these stages do not include measures of execution. In other words, a waiver of immunity from jurisdiction does not imply consent or submission to measures of execution.

Perhaps the most striking feature about the case is that the court adopted the common law court technique in citing and relying upon the opinion of English jurists and law books. The court unquestioningly relied upon R.H. Graveson's view²¹ to the effect that ".... submission gives the court power to enter judgement, to hear an appeal and to award costs against the foreign sovereign; but not to enforce a judgement by execution".

The notion of waiver of immunity and its consequences arose again in a case decided by the Court of Appeal in 1969,²² in which another agency of the Egyptian Government was involved. The applicant sued the UAR Educational Mission for the recovery of £s307.981 after leaving their service as a schoolmistress. A

subpoena had been served on the respondents and, on their failure to appear, an ex parte decree was rendered. The respondents appeared later and raised the question of jurisdiction. Accordingly, the District Court declared itself incompetent and dismissed the case. The Province Court set aside the dismissal order and remitted the papers to the lower court for trying an issue which it had framed. In the Court of Appeal the applicant contended that the respondents had submitted to the jurisdiction of the court by appearing and hence had waived their immunity. In reply, the respondents denied any submission. The Court of Appeal accepting this argument observed that: "mere appearance to contest jurisdiction does not amount to surrender to jurisdiction".

The court referred to a statement of Lord Sumner in Duff Development Co. v. Government of Kelantan²³ and said: "It is obvious that the foreign sovereign has to appear at some stage or another to raise a voice of objection vis-a-vis jurisdiction", and that a foreign sovereign is subject to the jurisdiction of the local court "only when he submits to it as a plaintiff or by appearing as a defendant without objection". The case was cited by the Court of Appeal without even being described as an English or foreign precedent.

The applicant also asserted that the question of immunity ought to be resolved by a quasi-judicial mode by seeking an advice from the Ministry of Foreign Affairs on this question. The Court of Appeal categorically accepted the assertion and stated that the question whether an entity forms part of the foreign sovereign and is thus recognized as immune is a part of the political question doctrine. The court concluded that: "Who is immune and why, are questions for the authoritative political decision-maker and hence outside our province qua courts of law". The court assumed that the Ministry of Foreign Affairs had had sole responsibility for making the decision involved, and therefore a certificate should be obtained from it as to the position of the Egyptian Educational Mission before the courts of the Sudan.

The Sudanese courts have accepted too readily the assertion that both the Egyptian Department of Irrigation and the Educational Mission were organs of the Egyptian state. It is undoubtedly true that proceedings against organs of a foreign state may implead the foreign state concerned, especially in regard to the activities performed by them in the exercise of the sovereign authority of the state. In both the cases, the entities involved were subsidiary organs of the Egyptian Government. The former was a branch of a sub-division of the Egyptian Ministry of Irrigation, charged with the task of supervising the flow of the Nile waters through the two dams constructed in the Sudan to regulate the withdrawal of the water from the Nile by both countries throughout the various seasons of the year, by an Agreement signed in 1959.²⁴

A survey of the provisions of the treaty could easily show that this Department is not entrusted in any way with the exercise of sovereign rights on behalf of the Egyptian Government, but only administrative functions conducive to the attainment of the objective of the Agreement. On the other hand, the Egyptian Educational Mission is an organization established in 1957 as part of the cultural cooperation scheme following the Agreement signed between the two countries in 1957 and entrusted with the task of running private schools in the Sudan. In this sense, neither of them necessarily form any part of any ministry and are not themselves autonomous state organs answerable to the Egyptian Central Government. In the light of these considerations, it is difficult to see how the court in the first place had characterized the Irrigation Department as a state entity and thus considered the action against it as impleading the Egyptian state. In the second, although the court avoided making that characterization by deferring the matter to the political organ of the Government, yet the decision clearly proceeded on on that assumption, since the judgement was rendered on the basis of the absence of an effective waiver of immunity, a basis which undeniably presumed the pre-existence of immunity of the entity concerned, which could be effectively waived. Furthermore, both cases arose out of activities conducted by the entities in question not in the exercise of the sovereign authority

of the Egyptian state. A contract of employment is necessarily a private act performed in the exercise of a purely non-sovereign act and, as such, cannot be said to implead the Egyptian Government.

The principle of immunity has been affirmed by the District Court of Omdurman²⁵ in an action brought against the Turkish Government in respect of personal injuries suffered by the plaintiff as a result of an accident in which a car belonging to a Turkish trade representative was involved. In defence it was contended that the Turkish representative was identified with the Turkish Government, hence he could not be subjected to the jurisdiction of the court. In refusing to permit the suit, the court observed that:

The Republic of Turkey is a sovereign state; that by virtue of the principle of immunity from jurisdiction in international law, a sovereign state cannot be made to submit to the jurisdiction of a foreign state against its will.

This was true even as regards suits arising out of personal injuries occurring within the jurisdiction of the court. The court therefore declared itself incompetent.

Despite the increasing acceptance of the restrictive doctrine, especially since the early 1970s, the Sudanese Courts show no inclination to move in this direction. The decision of the Khartoum District Court of 1975²⁶ firmly adhered to the old version of state immunity in dismissing a suit brought by a former clerk concerning an employment contract concluded with the French centre, forming part of the French Embassy in Khartoum. The District Court dismissed the plaintiff's claim for £1,000 as compensation for remuneration based on a contract of employment. In dismissing the claim, the court held that the reciprocal independence of states was consecrated by international law; that each state was sovereign within its borders. It followed that one could not cite a foreign sovereign before one's court. The court said: "To do so would be a violation of the rules of international law". The court cited more than three English cases, all of them old, and a number of rather out of date editions of common law books, and made no reference to systems other than English law.²⁷

The immunity of a foreign sovereign or head of state has indirectly been discussed in a recent decision rendered in the matter of the Trial of May Coup d'Etat Preparators.²⁸ During the course of the trial, one of the defendants sought to summon Yasir Arafat, the PLO's President, as a defence witness. The court, partially relying on an informal advice from the Ministry of Foreign Affairs, declined to issue the summons on the ground that Mr Arafat is akin to a foreign sovereign, since the PLO is a recognized foreign entity by the Sudanese Government. The court held that Mr Arafat is a foreign head of state, that he enjoys jurisdictional immunities from personal arrest, detention, and all other legal process within the territory of the Sudan, including the process of summons against his will.

Thus the judicial practice in Sudan comprises a few cases from which it may be concluded that the traditional doctrine of absolute immunity is too readily followed on the lines adopted by earlier English courts in this respect. A possible explanation for this may be summarized as follows:

- 1) The British judges who were appointed in an earlier period had no theoretical knowledge of civil law systems and were not trained in any continental system where the doctrine of restrictive immunity emerged and developed.
- 2) The first generation of Sudanese judges to join the Bench were trained exclusively in English law. They were far removed from continental practice in international law, of which, due to the absence of law reports, no readily accessible record was available.
- 3) Generally speaking, English rules were the only laws within the contemplation of the parties in commercial and related matters.²⁹

It is also important to emphasize that the local judicial precedents have a unique position under the Sudanese legal system. Courts often accepted the authority of local precedents, even in a situation where they can easily be distinguished.³⁰ Naturally

enough, no change in the law is expected to be effected by judicial decisions and, to this extent therefore, very little in the way of change may be anticipated from the judiciary.

III. TREATY PRACTICE

In the Sudan, treaty-making power rests with the executive.³¹ Parliament is normally advised of a treaty that calls for implementing legislation. However, certain classes of treaties require the approval of the legislature before the executive may ratify or accede to those treaties. Examples are: a) treaties of alliance and defence; b) treaties involving a territorial change; c) treaties changing or requiring changes in domestic law; or d) treaties imposing financial obligations upon the state. The requirement is, in principle, independent of the need for implementing legislation; the respective classes of treaties cannot be ratified or acceded to unless they are approved by the legislature, whether or not they require implementing legislation.³²

1. Multilateral Treaties

Relating to the international conventions on state immunity,³³ the Sudan has not yet become a party to these instruments,³⁴ with the exception of three, namely: the Vienna Conventions on Diplomatic Relations 1961; Convention on Settlement of Investment Disputes between States and Nationals of Other States of 1965 and the Law of the Sea Convention 1982. When the Sudan achieved its independence in January 1956, it rejected the conclusion of an agreement providing for the devolution of treaty rights and obligations.³⁵ Reference to Sudan's succession to treaties concluded by the co-dominion was made in Egypt's Declaration of the Independence of the Sudan of 1 January 1956,³⁶ in which the Egyptian Government expressed its understanding that the Sudan would continue to give full effect to the agreements and conventions made on behalf

of or applied to the Sudan by the co-domini with a similar statement by the United Kingdom³⁷ that: "Since the Sudan Government has only now assumed powers in regard to external matters", it requested the British Government to "make specific mention of the agreements and conventions contemplated by the above-mentioned letter" so that it may be in a position to comply with the British request.³⁸ The British Government prepared a note containing the treaties which, according to its view, were to be given effect by the Sudanese Government.³⁹ The note was sent to the Egyptian Government. Egypt realized that most of the treaties embodied in the note had been concluded by Great Britain alone and that, among these treaties, Egypt was only interested in the Nile Waters Agreement of 1929 and those embodied in the Convention of 1899, which related to the boundaries between the Sudan and Egypt.⁴⁰ The matter was suspended because of the Suez crisis (1956) and the resulting termination of Anglo-Egyptian relations. Thus, no agreement was reached between the Sudan on the one hand and Great Britain and Egypt on the other as to the determination of the previous treaties and agreements by which the Sudan would continue to be bound. However, the Sudanese Transitional Constitution of 1956 provided in Art. 67 that "No treaty, agreement or convention with any other country or countries shall have effect in the Sudan unless ratified and re-affirmed by Parliament by law". The object of this text would seem to be merely to explain the status of future treaties.

At any rate, several domestic legislative acts were passed in the following year either ratifying or affirming various multilateral treaties. These were the Constitution of the FAO,⁴¹ UNESCO,⁴² WHO⁴³, the Charter of the United Nations and the recognition of the compulsory jurisdiction of the ICJ,⁴⁴ the Constitution of the ILO and a number of ILO conventions,⁴⁵ the Convention on International Civil Aviation,⁴⁶ the four Geneva conventions on armed conflict,⁴⁷ and the World Meteorological Organization Convention.⁴⁸

It may be observed that treaties made on behalf of the Sudan or applied to it before independence were not regarded as binding on

it after its independence. There has been no specific declaration to succession to treaties, but instead various laws were promulgated to accede to certain multilateral treaties. However, it should be emphasized that most of the conventions dealing with various aspects of state immunity were invariably adopted after the independence of the Sudan in January 1956, with the exception of the Brussels Convention of 1926 and its Additional Protocol of 1934 to which Egypt had acceded in 1951 in its own name, and which the United Kingdom ratified only in 1980.⁴⁹ The Sudan has as yet not accepted the other treaties on state immunity. The reasons for delay in the acceptance of treaties on state immunity are not clear. However, according to the information obtained from informal discussions with the officials concerned, the protracted administrative work involved in carrying out an examination of treaties by several government departments has been one of the important factors for such delay. The views of a relatively large number of government department offices and agencies have to be obtained before the instrument is submitted to the competent body for approval. Elaborate inquiries and consultations have taken place between various departments and bodies on the Vienna Convention on Diplomatic Relations 1961. The inter-departmental consultations on this convention were so prolonged that the Sudan was able to accede to it only after an interval of 20 years.⁵⁰

Progress towards acceptance sometimes stopped altogether because of the impossibility of reconciling divergent opinions as in the case of the Conventions of the Law of the Sea 1958. Of course, the Sudan, like other developing countries, lacks the financial and technical resources needed to collect and compile existing information concerning how certain legal concepts and issues concerning the same or related subject matter has been treated in the past.

The consequences of such delays in the acceptance of those conventions, particularly those dealing with specific issues of state immunities, are apparent in the present inquiry. In the absence of a high record of acceptance of these instruments by the

Sudan, it is virtually impossible to appreciate and evaluate the country's attitude towards those concepts and the issue of immunities. By the same token, the views of the country cannot be solely deduced from the fact that it has accepted only three of those conventions, particularly when there is no domestic legislation implementing the provisions of those conventions nor are there judicial precedents involving their interpretation by domestic courts.

In addition to the Vienna Convention on Diplomatic Relations 1961 and the Law of the Sea 1982,⁵¹ the Sudan has recently become a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.⁵² State signatories to the convention have discretion to exclude certain items from its field of application and the Sudan has made use of that faculty in connection with oil. However, obstacles may present themselves if the Sudan challenges the binding nature of the rule of non-immunity if arbitration is initiated outside the orbit of the convention. For example, if the Sudan denies the binding nature of this rule, a private litigant may be exposed to the expenses and delays of litigation so as to establish the binding character of the state's consent to arbitration. Again, problems may arise at the time of recognition and enforcement of an award rendered against the Sudan, outside the orbit of the convention, since the Sudan may argue that recognition is a preliminary to execution and raise a plea of immunity in that connection. The problem becomes apparent if we recall that the Sudan has not yet become a party to the UN Convention of Recognition and Enforcement of Arbitral Awards of 1958, nor does it have any bilateral arrangement with other countries relating to recognition and enforcement of foreign arbitral awards. A private litigant who obtained an arbitral award against the Sudan would have to take these possibilities into consideration when seeking to enforce his award which was rendered by a non-ICSID arbitration. Such obstacles are removed in the case of an ICSID arbitration, since consent to submit the dispute to arbitration under the convention, once given, cannot be unilaterally revoked and thus constitutes an irrevocable waiver of immunity.

The problem of immunity from execution is also resolved at the time of recognition of an award rendered pursuant to the convention. The ratification of the convention by the Sudan signifies the acceptance of the obligation to recognize the award and to enforce the pecuniary obligations imposed by it, as if the award were a final judgement of a court in the Sudan.⁵³

It may be asked whether ICSID arbitration is designed mainly for investment disputes or if it necessarily covers all disputes that may arise from the Sudan's commercial and financial activities. For instance, the Sudan is a heavily indebted country to foreign institutions and financial communities; and borrowers may well invoke the provisions of the convention against it in cases concerning loan agreements. However, there is general agreement that the convention, in the absence of express reservation by the state party, applies to loan agreements.⁵⁴ The answer to the question is extremely important both to lenders and governmental borrowers in the context of the restructuring of Sudan's foreign sovereign debts. Since there seems to be no precedent on this point, it might be in the interests of lenders who wish to enter into loan agreements with Sudanese governmental organs and to benefit from the protection offered by the convention, to secure an explicit agreement that the guarantees under the convention include not only direct investment but transnational loans as well, otherwise their agreements might be excluded from the ambit of the convention and accordingly they will have exposed themselves to the obstacles mentioned above.

Alternatively, the plea of immunity which may be raised by the Sudan Government in the context of an arbitration concerning sovereign debts may be avoided simply by express agreement to the contrary in the arbitration clause without reference to the ICSID Convention.⁵⁵ At any rate, the ratification of the convention by the Sudan seems indicative of the willingness on the part of that country to strike a balance between immunity and sovereignty, in order to encourage the flow of capital and services into a country

which desperately needs the foreign contributions, so vital to its development. It is indeed a fact that the realities of the contemporary world, based on the need for closer cooperation between developed and developing countries and for a new, fairer and more equitable international economic order, require a more flexible approach to the concept of sovereignty and immunity.

2. Bilateral Treaties

The Sudan has entered into a number of bilateral treaties relating to immunity. Among these is the Agreement on Technical Co-operation between the Kingdom of Netherlands and The Democratic Republic of the Sudan 1969.⁵⁶ Under para. (h) of Art II of this treaty the Sudan agreed to ".... grant the Netherlands personnel immunity from legal action in respect of any act done and words spoken or written in their official capacity". The agreement between the Government of the Republic of France and the Sudan of 1969 similarly provides in Art. 10(2) that the French Government is exempted from local jurisdiction in respect of any acts or words performed by it and covering the activities contemplated by the agreement.⁵⁷ However, the agreement expressly excluded from such exemption "suits instituted by third parties in respect of an act attributable to the French Government, resulting in personal injury or physical damage in the Sudan", and other acts of a wilful or malicious conduct on the part of the French employees in the country.

The tendency to exclude personal injuries and damage from the scope of immunity is also observable in other bilateral treaties. For instance, the Agreement between Canada and the Sudan,⁵⁸ which provides that the Government of the Sudan shall exempt Canadian firms from civil liability for acts performed in the course of their duties except where it is legally established by a Sudanese court of law that such acts result from gross negligence or wilful misconduct on their part (Art. V). Strikingly similar words were employed in the agreements with the Federal Republic of Germany⁵⁹ and Italy⁶⁰.

The Agreement of Technical Assistance with the UK⁶¹ is peculiar, since it is consciously proposing an extension of immunity beyond its normal and established scope. In Art. XV(1) of the Treaty, the Sudan agreed to bear all risk and claims resulting from, occurring in the course of, or otherwise connected with an action performed or omission made in the course of the duties of the British officers. Without affecting the generality of the preceding sentence, the Government of the Sudan agreed to:

indemnify the Government of the U.K. and the technical assistance officers and hold them harmless against any and all liabilities, suits, actions, demands, damages, costs or fees on account of default, injuries to persons and property, or any other losses resulting from or connected with any act or omission performed in the course of their duties.

Moreover, it was provided in para. (2) that the Government of the Sudan, if requested by the Government of the U.K. or by a technical assistance officer, would "conduct on behalf of the Government of the U.K. or the technical officer any litigation arising out of acts or omissions referred to paragraph (1) of this Article".

This agreement not only granted immunities to the UK Government and its employees from the jurisdiction of the local courts, but even obliged the Sudanese Government to defend any claim or suit which might be brought against them. Another peculiar aspect of this extension is that the UK Government is exempted from cost in the event of participation in a judicial process and its liabilities, for any risks or claims concerning the execution of the agreement are assumed by the Sudan. The memorandum accompanying the agreement protested against such an extension, largely on the ground that the scope of the immunities provided for in the agreement is extensive and judicially unmanageable.⁶² Nevertheless the agreement was approved and ratified.

In the light of these provisions, the following facts are discernible:

1) Generally speaking, most of the foreign states concluding agreements in this area maintain a position of immunity from process before Sudanese courts under a variety of circumstances. Most of these treaties reiterated the qualification that the act complained of should have been done in the performance of an official act on the part of the foreign state or its representative. Whether this restriction could be interpreted as providing a criterion introduced to distinguish between acts performed jure imperii and acts performed jure gestionis is not clear, and cannot be easily determined from the terms of the agreements. However, the presence of such qualification presupposes the existence of an absolute standard of immunity which is refined, or the applicability of which is minimized.

2) The most unusual feature of the agreements is that in which the liability for personal injuries and physical damage to third parties is excluded from the scope of immunity. It is significant to observe that this exception has been tied into both the questions of immunity and jurisdiction. In other words, the liability of the foreign states or their agencies to pay damages in respect of an act resulting in personal injury to a third party operates even where the foreign state or its instrumentality has been acting in the exercise of governmental power, only so long as the act occurred in the Sudan. Until recently, this exception of state immunity was relatively unknown in those jurisdictions applying a more "absolute" principle of immunity and generally the practice of states has been neither uniform nor consistent.⁶³

3) The Agreement with the UK constitutes a class of its own and is probably the "most controversial" of all treaties in so far as it deals with certain types of privileges and immunities not traceable in traditional state practice. The undertaking by the Government of the Sudan to assume all liabilities and claims arising out of the activities of British officers in the Sudan, to indemnify the UK Government and its officers and exempt them from judicial process, and even to defend them in any suit brought against them in respect of their activities in the country, is a far reaching provision.

This Agreement adds to the uncertainty and ambiguity already existing in treaty practice on this subject and it is difficult to fit it into the traditional models of state immunity.

The treaties which grant foreign governments certain privileges and immunities in their own name posed no particular problem. However, it might be argued that personnel immunities are not state immunities proper. To this it may be replied that their immunities were specifically regulated by state to state arrangements and that those employees of foreign governments do not enjoy immunities as subjects of international law. The immunities they possess belong to their respective states who are the real beneficiaries of these immunities and which the Sudan agreed to extend to the latter's employees by way of bilateral agreements.

IV. GOVERNMENTAL PRACTICE

Like Egypt, there is no published documentation in the Sudan, from which the attitude of the Government on the subject could be deduced. Answers to the UN questionnaire could be used to remedy the situation resulting from the scarcity of published documentation of the existing governmental practice.

The attitude of the Sudanese courts was reiterated in these words: "the courts regard the doctrine of immunity as absolute but subject to waiver".⁶⁴ The role of the Sudan Government, especially in the definition or delimitation of the extent of the application of these immunities, was said to differ according to the circumstances of each case. The executive branch "may widen or restrict the scope of the immunities and privileges accorded to states and their property as circumstances may dictate".⁶⁵

If a foreign state applies to the administrative authorities of the Sudan for a patent licence, a permit or any other administrative action, the reply stated that special treatment on procedure

and substance could be conferred on the foreign state and it would thus not be treated like any other applicant.⁶⁶

According to the reply, waiver of immunity from jurisdiction does not imply consent or submission to measures of execution and the courts of the Sudan will have to reconsider the question of its own competence when it comes to the execution of judgement rendered against a foreign state.⁶⁷

The present topic is of critical importance to the Sudan Government. It is of interest to consider the attitude of the Sudanese Government in the reverse situation. In other words, when faced by claims before foreign courts and tribunals, the Attorney-General's Chambers are responsible for defending such cases and has usually instructed the foreign lawyers retained by it to plead sovereign immunity before foreign courts and tribunals.

Of peculiar interest are the two cases in which the Sudan Government was involved before foreign jurisdiction. The first of these was Turiff's case.⁶⁸ An English construction company, Turiff, had entered into a contract on 8 November 1959 with the Sudan Ministry of Public Works for the erection of new houses in which to resettle the people whose land would be inundated by the pile-up of water following the completion of the Aswan High Dam. The Sudan Government had only a period of 44 months within which to have the housing project completed. It was thus apparent that, if any substantial part of the scheme was to be completed in time, Turiff would have to work with great speed. Shortly after the beginning of the work, complaints began to be made by each of the parties. The Sudan Government alleged delay on the part of Turiff and the latter claimed that they were unable to proceed faster for lack of, and changes in, decisions as well as lack of raw materials, transport facilities, etc.

These cross allegations reached their climax in August 1963, when the Sudanese Minister of Interior addressed a letter to Turiff claiming that the company had failed to fulfil their obligations

under the contract and that the Government intended after 14 days to take possession of the site and to employ other contractors to carry out a large part of the work undertaken by Turiff. The Government's right to do so was disputed by Turiff but in vain. In October 1963 the Government brought other contractors to the site who commenced their own work. Turiff accepted such repudiation of the contract. On 21 October 1966, both parties signed an arbitration agreement and accordingly a tribunal was established under the auspices of the Hague Court of Arbitration.⁶⁹ By clause 3 of the arbitration agreement disputes were defined as those both falling within the description and defined in the pleadings to be served. The matters to be determined by the arbitration were described as those capable of being so determined and that all the necessary requirements to constitute the tribunal and to confer authority upon it had been complied with. Clause 4(1) conferred on the tribunal, inter alia, 1) the power to interpret the agreement, to judge its own competence to decide any matter in dispute; and 2) to proceed with the hearing of the case notwithstanding any failure on the part of one of the parties to participate in the proceedings and to make any such order or award as it should think fit (Clause 4(7)).

The Sudan Government argued in its preliminary pleading that the contract between the parties was void because of a mistake. The Government incorrectly believed that no part of Turiff's share capital was owned directly or indirectly by South African companies and that was said to be a fundamental mistake, as the policy of the Government had been for a number of years to have no commercial dealings with the Government of South Africa or its nationals. This point was made clear and in considerable detail by the Sudan's Prime Minister to the British Ambassador at Khartoum.⁷⁰ On 14 May 1969 the Sudan Government took the quite unprecedented step of withdrawing from the proceedings by a letter addressed to the Court of Arbitration at the Hague.⁷¹ The tribunal continued with the proceedings and gave an award ex parte in favour of Turiff. The tribunal rejected the South African issues as the burden of proving these matters fell upon the Government which chose not to appear and

to support its allegations. The claim of the company was accepted and damages were awarded for the unpaid remuneration and repudiation of the contract.

Perhaps the most interesting point in the dispute was that Turiff had sought an attachment order before the Hague District Court against certain vessels belonging to the Sudan Shipping Line, which was owned jointly by the Government and the Bank of the Sudan. In the event, no proceedings for attachment were in fact taken, but had they been, the Sudan Government had decided to plead sovereign immunity from execution on the ground that, under the rules of public international law, the property of foreign states is immune from measures of execution.⁷² The case was amicably settled by the parties before the District Court decided the issue of sovereign immunity. It may be remarked that the conduct of the case by the Sudan Government before the arbitral tribunal can hardly be reconciled with established practice in commercial arbitration under which the consent of the state party to arbitration once given cannot be unilaterally revoked. The decision of the government is particularly damaging in view of its lasting negative effect on the 'image' of the country in the minds of future investors.

The way in which the case was conducted shows that the apprehension of some Arab states "about exposing their young fragile public corporations to foreign arbitration", does relate to real problems. Dr Zaki Mustafa has listed a number of common problems including: 1) lack of adequate understanding; b) lack of consultation and coordination between and within the government units concerned; 3) failure to realize that what may sometimes seem to be politically desirable or convenient may not be legally feasible or advisable; d) failure to raise the proper defences when the proceedings started.⁷³

Some other jurists have maintained that the refusal by the Sudanese Government to afford the arbitral remedy for which it contracted with an alien constitutes a "denial of justice". Judge Schewebel, briefly mentioning Turiff's award, expressed the view

that the award can be read to support this analysis. He summarized his conclusion as follows:

.... the award is open to the construction that to give effect to Sudan's attempt to frustrate the arbitral process would give rise to a denial of justice. The Turiff award, however summary on this point, thus arguably is authority for the position that, if a state by its unjustified absence from arbitral proceedings causes an international arbitral tribunal not to proceed, a denial of justice under international law results. 74

Whether the passage of the award led to this conclusion is beyond the scope of this study. However, due to the same considerations, the decision of the Sudanese Government to plead sovereign immunity in order to avoid the enforcement of the award is equally regrettable. Under these circumstances one cannot afford to ignore the degree to which international economic pressure can be brought to bear on the economic standing of a developing country like the Sudan. The Turiff's award was rendered before the Sudan had acceded to the ICSID Washington Convention of 1965 and it is hoped that the ratification of the convention may remove these shortcomings and contribute towards a better understanding of the concept of commercial arbitrations and the rules applicable to them.

The same attitude can also be noted in ordinary judicial proceedings involving the Sudan Government before foreign courts. A recent case was initiated against the Sudan in a New York district court.⁷⁵ The facts are as follows. A US company agreed to work as a carrier in transporting American famine aid to different parts of the country. The agreement was signed in Khartoum in 1983, under which the Sudan Government agreed to pay all taxes, duties and the like for the famine relief aid. A dispute had arisen on this term as well as on other managerial matters. Consequently the company instituted proceedings against the Republic of the Sudan claiming damages for breach of contract and a summons was served on the Sudan Government through the Sudanese Embassy in Washington. Although the Sudan has not yet formally appeared before the court to defend the claim, it is clear from inter-departmental correspondence that the Sudan will invoke sovereign immunity to contest the

jurisdiction of the court on the traditional ground of sovereign immunity.

The relief operations carried out by the Sudan to stave off famine raises an interesting question of categorization, namely, whether or not these operations could be regarded as commercial activities. On the point whether humanitarian activities, even where ostensibly conducted through an agreement involving huge financial obligations, would be considered as a governmental act, there is a scarcity of precedents,⁷⁶ no academic discussion, and the matter still remains to be resolved.

Even if that act is characterized as commercial, it remains extremely doubtful whether under the US Foreign Sovereign Immunity Act the American Court would be able to establish its jurisdiction over the present dispute. Since, according to Art. 1605(a)(2) of the Act, the act of the Sudanese Government a) is not based "upon a commercial activity carried on in the United States" by the Republic of the Sudan; b) is not based "upon an act performed in the United States in connection with a commercial activity of the Republic of the Sudan"; nor c) is it based "upon an act outside the territory of the United States in connection with a commercial activity" of the Sudan elsewhere "and that act causes a direct effect in the United States". There appears to be no territorial nexus between this activity connected with the United States and the plaintiff's claim. The contract was concluded outside the United States, and was to be wholly performed elsewhere, and there seems to have been no "direct effect" in the United States. However, the court may, under the present increasing tendency towards restrictive immunity in US judicial decisions, consider the "direct effect" clause to be applicable since the plaintiff is a US national and the remuneration under the contract is payable in US currency.

There is no available information from which evidence can be drawn of the motive of the Sudan Government for claiming sovereign immunity before other jurisdictions. However, statements expressed by the Sudanese delegate to the Sixth Committee of the United

Nations' General Assembly throw some light on the rationale of the Sudanese governmental practice in this matter. In addressing the Report of the International Law Commission on its work in the 38th session, the Sudanese delegation shared the concern expressed by the delegates of other developing countries regarding the sacrifice to state sovereignty which might result through an unwarranted extension of the doctrine of restrictive immunity. He stated that the commission should deal with the concerns of the developing countries in a manner that would enable those countries to pursue their socio-economic programmes.⁷⁷ Further, he also explained that certain activities carried out by states should not be regarded as commercial activities. That was particularly applicable to developing states with mixed economies or developing countries establishing non-profit development corporations. He maintained that these activities were mainly undertaken as part of the development process and, as such, they "should not be regarded on the same basis as activities of private entities, or as governmental activities that were clearly profit-oriented".⁷⁸

Although he was not specifically speaking about his own country, what he has said is perfectly true in the Sudan where the government has intervened and monopolized certain strategic commodities such as sugar, petroleum products, flour, etc., in order to establish and maintain the standards of subsistence in the country. Indeed this is highly desirable for the government in a country with such serious financial and other problems. If disputes arising out of these activities are to be regarded as commercial and thus subject to the jurisdiction of foreign courts, major obstacles may be put in the way of the government and further restrict both the internal and external efforts of the government in achieving these standards. Important questions remain to be answered: Would it be in the interests of the Sudan Government to adhere to the doctrine of absolute immunity in the present day world, when sued before foreign courts and tribunals? Would it be in the interests of the Sudan Government if foreign states that enter into a commercial contract then claim immunity in proceedings

brought by one of its nationals who claim rights under the terms of the contract? The essential point is that, in determining the policy on this matter, the Sudan Government has to see itself both as a forum state and as a defendant state in another forum, and base its decisions on wide political, legal and economic considerations.

As a defendant before other jurisdictions, it would not be in the interests of the Sudan Government nor its public entities to maintain absolute immunity vis-a-vis that foreign jurisdiction. Such a situation would appear to be unsatisfactory both for the promotion of economic development and the fostering of good international relations. The successful growth and prosperity of the Sudanese economy depends on favourable external economic and financial relationships. In future, the Sudanese economy may require even greater contributions from the foreign sector.⁷⁹ Whether these will be forthcoming will depend in the first place on the degree of support and encouragement given to foreign investors by the government. These include an attempt to attract foreign investment by adopting domestic legislation to encourage the investment of foreign capital⁸⁰ and a sensible attitude towards questions of sovereignty and immunities in external economic relations. In connection with this last point, and in order not to lose the advantage of certain commercial activities and the flow of capital from other countries, it is advisable that the country should agree to some limitations of its immunities, otherwise international investors may well shy away from investing in the country which would be a very real loss. Like other developing countries, the form and shape of the Sudan's own activities are also changing, since it increasingly participates in and joins multinational corporations for its own benefit. These are relevant considerations in developing a legal framework.

V. MUNICIPAL LAW AND STATE IMMUNITY

As the question of jurisdiction of a municipal court is primarily determined by the court itself, at least in the first instance, the judge who is called upon to decide the issue may refer to his own municipal law to determine his own competence. Thus provisions of municipal law may prescribe the possibilities for states or state instrumentalities becoming parties to disputes before municipal courts, particularly when foreign states appeared as plaintiffs or otherwise relinquished their immunity by submitting to the jurisdiction of the local courts.⁸¹ Examples of such municipal enactments may be found in several texts dealing with the question of jurisdiction generally such as the Constitution, the Law of Civil Procedure, Commercial Law, Taxation Law and Conflict of Law.

1. Jurisdiction over the Sudanese State

The rule under which the Sudanese Government itself is subject to the laws of the land is uncontested in Sudanese law. It was formally expressed for the first time in The Interpretation and General Clauses Ordinance 1955⁸² as "The Government shall be bound by all laws unless expressly exempted therefrom".⁸³ The word law was defined in S.4 of the Ordinance to mean "any legislative enactment and includes ordinances and provisions and orders and any regulations, rules, by-laws or orders made under the authority of any ordinance or provisional order".⁸⁴

The submission of the state to the rule of law was made a constitutional provision in the Permanent Constitution of The Sudan of 1973.⁸⁵ Art. 59 provided that "the state is subject to the rule of law and the supremacy of the rule of law shall be the basis of government". The same principle is reiterated in the Transitional Constitution of The Sudan of 1985 and its amendments.⁸⁶ According to Art. 11, "The state and all other juridical bodies, whether natural or corporate, official or private, shall be subject to the

rule of law as administered by the courts".⁸⁷ Most significantly, Art. 26 of the constitution has expressly denied any jurisdictional immunities to the state in respect of all of its activities. The Article reads, "The right of litigation is reserved for all, every person has the right to petition the competent courts and the state is not immune from judicial process regarding any of its activities".⁸⁸

The significance of this provision is clearly expressed in the Explanatory Memorandum that accompanied the Bill.⁸⁹ According to it, the former rule of Sudanese public law which, originating at a time when state absolutism flourished in the Sudan, forbade the judiciary to decide litigation involving the state, is no longer enforceable. Commentators on the subject have added that the system inaugurated by the Transitional Constitution has been inspired by distrust of the governmental practices under previous regimes. Its intent was to safeguard private rights from incursion by the executive, by putting them under the protection of the judiciary.⁹⁰

2. Jurisdiction over Foreign States

(a) Jurisdictional immunities of foreign states

Like Egypt, there is no text in Sudanese law which formally allows or disallows foreign states jurisdictional immunities. The power of the courts to take cognizance of a suit in which a foreign state is involved appears to stem from Chapter II of the Civil Procedure Act 1983. The Act mainly reproduced the provisions of the repealed Civil Procedure Act 1974, and its provisions apply to civil procedure and matters relating to the conflict of laws and to any proceedings not specifically provided for by other laws. Art. 8 established the jurisdiction of the courts in cases of suits brought against foreigners who have domicile or residence in the Sudan "except suits in respect of immovables situate abroad". Art.

9 permitted suits in Sudanese courts against non-resident foreigners, in the following circumstances:

- (a) if the subject matter of the dispute is connected with a movable or immovable in the Sudan;
- (b) if the suit is in respect of a liability which arose or was performed or ought to be performed in the Sudan, or in respect of an act of bankruptcy or other acts which took place in the Sudan.

Moreover, Art. 13 declares the courts of the Sudan competent to decide suits not within their jurisdiction "if the defendant submits to such jurisdiction expressly or impliedly and the court shall not of its own motion declare itself incompetent for the lack of jurisdiction". If Arts. 8, 9 or 13 are applied by courts in a suit involving a foreign state, the result would appear to be that such a foreign state may be made subject to the jurisdiction of the courts of the Sudan. It is true that the use of the word 'foreigners' in Art. 9 is an internal evidence that the Article is intended to apply to individual foreigners. But the absence of the same word in the subsequent provisions of the same chapter of the Act strongly suggests that the scope of the Articles is not limited to engagements contracted by individuals alone.

(b) Exemption from custom duties and other fiscal liabilities

A foreign state is not normally liable to taxation or custom duties levied by the Sudanese Government. But the position of a foreign state where it establishes a business - official or commercial - or maintains an agency or instrumentality, is not clear. There is no explicit provision in Sudanese law which establishes or denies immunities to foreign states in these matters. Indeed state property is exempted under the Immunities and Privileges Act 1956 from certain kinds of taxation, as long as the property is used as diplomatic or consular premises,⁹¹ and immunity from income tax is accorded to members of diplomatic and consular missions under the Vienna Conventions 1961, 1963.

When it comes to private investment, the matter has to a large extent been regulated by various enactments recently promulgated,⁹² under which investors in the Sudan enjoy certain tax concessions, such as exemption from payment of business profit tax for a specific period of time which may be extended under certain circumstances.⁹³ Legislation such as the Industrial Investment Act 1974; Agricultural Investment Act, 1977; Agricultural Investment Act 1976 and the Provisional Order: The Encouragement of Investment Act 1980, are all designed to attract foreign capital and to encourage investment in the country. Extensive privileges and facilities have been accorded to foreign enterprises by these laws to varying degrees and under varying circumstances.

However, such legislation could be validly used by foreign investors against the Sudanese Government or its department as far as these incentives are concerned. In the absence of any domestic legislation, the better view seems to be that a foreign state must be presumed to have submitted to the sovereign authority of the territorial state, including its power to impose taxes, unless the territorial government either waives or consents to the exemption, for any reason or consideration, of its own free will.⁹⁴ It follows that, unless otherwise agreed in a bilateral treaty or multilateral convention, property taxes in the Sudan are payable, and accordingly any such immunities from tax lie outside the scope of the application of the principle of state immunities in the Sudan.

Detailed rules are set up for foreign companies.⁹⁵ If incorporated under the Companies Ordinance, they are subject to the taxes, regulations and formalities required to be satisfied by Arts. 247-255. No express exemption is provided for state-owned companies or companies in which a foreign state holds shares. Of course, if a foreign state set up a corporation with a distinct legal personality in order to carry on trading or commercial activities in the Sudan, proceedings against such a corporation would not necessarily implead that foreign state. The corporation

concerned would be sued in its own name and the provision of the Ordinance would thus be applied.

Moreover, it is generally believed that the law of the state of incorporation is exclusively applicable to all matters relating to the relationship between shareholders inter se or between them and the company, formation, registration, and the winding up of the entity concerned. The rational basis of the application of the law of incorporation is thought to lie in the fact that it is difficult or impossible to imagine the applicability of another law or another separate or independent legal system.⁹⁶

(c) Jurisdiction over state-owned vessels passing through Sudanese territorial waters:

The Sudan Territorial and Continental Shelf Act, 1970⁹⁷ regulates the position of foreign ships in Sudanese territorial waters. According to Art. 7, Sudan shall have the power to take all necessary action in the territorial waters: "... to protect itself against any act prejudicial to security, safety or interests of the Democratic Republic of the Sudan, according to the Sudanese laws, and rules of international law". Article 8(1) states that:

ships passing through the territorial waters shall comply with the Sudanese laws in force as well as the provisions of international law and agreements and, in particular, of those relating to carriage and navigation".

The word 'ships' has been used generally and without qualification, leaving ample room for the argument that the word 'ships' includes government ships engaged in commercial activities. If this interpretation is accepted, then these ships would not enjoy immunity either from judicial or other executive authorities of the Sudan.

Reference to the 'rules of international law' in the above-mentioned Articles may well be construed to mean those rules under which international law does not require extension of immunities of military ships to government merchant ships, and consequently the legal status of the latter is deemed to be the same as that of

private merchant ships.⁹⁸ These provisions are clearly influenced by the Geneva Conventions of 1958, to which the Sudan has not yet become a party, and their interpretation is subject to the prevalent rules of international law in which there are no binding rules that grant any particular category of non-military ships the same status as that of military ships from the point of view of state immunity. The nature of the jurisdiction of a state over its territorial waters is still a matter of controversy. Many writers strongly hold the view that the territorial waters form part of the territorial state and that the state exercises a right of ownership dominium or absolute sovereignty over these waters; while some others maintain that the state has only a limited sovereignty entitling it to exercise merely a jurisdiction, as opposed to dominium over these waters.⁹⁹ Whether this right is really of ownership or jurisdiction, it seems that state practice confirms the view that foreign merchant ships in territorial waters are under the jurisdiction of the coastal states, subject to the right of innocent passage.¹⁰⁰ The Sudanese Act appears to follow the same practice by providing that all foreign vessels (military or merchant) must strictly observe the laws and regulations of the Sudan while in its territorial waters. It seems that a foreign ship in Sudanese territorial waters, while not exercising the right of innocent passage, subjects herself to the local laws in respect of criminal, civil and administrative jurisdiction. On the other hand, a foreign vessel passing through the Sudanese territorial waters in lawful exercise of her right of innocent passage enjoys a certain degree of immunity from local jurisdiction. Although that degree of immunity has not been specifically provided for in the enactment, the better view seems to be that it is subject to the provisions of the Act and other principles of international law.¹⁰¹

(d) Measures of execution against the property
of foreign states

The Sudanese law throws little light on the issue of immunity from execution against the property of foreign states. The matter

has not yet arisen, even indirectly, before any court of law. Since the Sudanese judges in effect confine themselves to applying the municipal law of execution without really troubling themselves with international law, it is clear that any examination of Sudanese law on the matter must be focused on this same law.

The law concerning measures of execution before Sudanese Courts is generally governed by the Civil Procedure Act 1983.¹⁰² It is important to note that the Act has been made applicable to all other civil proceedings which are not provided for by other laws. Detailed rules concerning execution of judgements have been set up by the Act. By virtue of Art. 232, the power of the court to order an execution of a judgement duly passed in accordance with the Act, may take any of the following forms:

- 1) to order payment of any sum of money specifically decreed;
- 2) to order the attachment or sale of any property;
- 3) to arrest the defendant and detain him in prison;
- 4) to appoint a receiver;
- 5) to take any other measure of execution required by the nature of the thing decreed.

Measures of execution involving property start with the defendant's movables, with no measures being allowed first against his immovables, unless the court is satisfied that his movables could not meet the judgement passed against him (Art. 234).

Again complicated procedures are laid down for the exercise of the measures and the various circumstances under which they may be taken. Most importantly, this chapter of the Civil Procedure Act is applicable to the execution of all judgements and decrees entrusted to civil courts of law. But the question which has never arisen in practice is this: could the rules and procedures laid down in the Act be equally applied to the property belonging to foreign states, and in particular could they be applied by analogy to the property of entities representing foreign states in the Sudan?

Given the lack of any precedent specifically on this point, an exhaustive answer is not an easy thing to give. However, two tentative observations can be made in this respect. In the first place, where an entity according to the municipal law of the country to which it is attached is regarded as an organ of that state, it may subsequently be identified with that state, so the property of that entity must be considered as belonging to the state itself, and as such enjoys absolute immunity from the process of execution following the general trend of absolute immunity from the jurisdiction observable in the country's judicial practice. Thus, to extend by analogy the scope of a procedure such as that provided for in the Civil Procedure Act 1983 to foreign states would constitute an undertaking, the legitimacy of which would be extremely questionable. According to this interpretation the status of property belonging to foreign states should not be dealt with in the same way as the property of private individuals. On the other hand, it could well be argued that the provisions of the Civil Procedure Act 1983 are equally applicable to foreign states for the following reasons:

- 1) The Act is generally applicable to all civil cases which have not been provided for by other laws. Obviously enough, suits against foreign states fall into this category.
- 2) The chapter on execution is expressly stated to apply to all measures of execution entrusted to civil courts of law without any distinction or qualification whatsoever.
- 3) There seems little purpose in distinguishing between private and public property in this respect. Both are subject to the same due process of law enforced by ordinary courts of law.
- 4) The argument that the chapter on execution applied only to individuals seems equally inconclusive, since other provisions of the chapter are applied to the Sudanese Government. Art. 231 enables the court to order the execution of judgements rendered against the Sudan Government albeit with certain reservations as to

time and procedure. Accordingly, it could well be asked why, since the courts are competent to take measures of execution against the Sudan Government at the instance of an individual, foreign states and their property should enjoy a privilege which the legislator has been unwilling to accord to the Sudanese Government. Even if this argument is accepted, and thus the property of foreign states was made subject to local jurisdiction, more delicate questions may arise, namely: What categories of property are subject to these measures, and according to which law are the legal interests of foreign states in these properties to be ascertained? In answering the first question, it should be remembered that the applicability of the Civil Procedure Act 1983 to the property of foreign states, does not affect the general rule of state immunity, since the rule would still remain that measures of execution and sequestration shall not be enforced against the property of a foreign state, where this property is used in connection with governmental activities which are not related to any commercial undertaking. In other words, once the property of foreign states has been proved to fall outside the orbit of this rule, then the chapter of the Act on execution is applied in its entirety to the situation.

As to the question of determining which legal system is to be applied to ascertain the interest which a foreign state has in certain property, the Sudanese system of private international law may come into play and, therefore, whether to apply national law or foreign law could be determined by employing the appropriate rules of Sudanese private international law.

(e) Immunity within the context of foreign judgements

The effect of judgements rendered by foreign courts in the Sudan is governed by Arts. 38-42 of The Civil Procedure Act 1983.¹⁰³ Section 38 provides that:

A foreign judgement shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigation under the same title

Accordingly it will not be possible for a litigant to ignore the foreign judgement and petition a Sudanese court on the original cause of action. Where an action has been based on a foreign judgement under this section, the defendant may raise any of the following objections:

- a) the decision has not been rendered by a court of competent jurisdiction;
- b) the decision is contrary to international law, or is based on a refusal to recognize the law of the Sudan in a case in which such law is applicable.¹⁰⁴

Under the first exception the Sudanese courts will not enforce a judgement if it is not delivered by a court of competent jurisdiction. In cases where a foreign state was sued as defendant, it may well be argued by the foreign state that it was impleaded before the foreign court without its consent and, as a sovereign state the foreign court had no jurisdiction to take cognizance of the suit in the first place. Although contesting jurisdiction of local courts on the basis of sovereign equality is in itself a very debatable issue today, at least this is the law as far as Sudanese judicial practice is concerned. Therefore, under this exception, a foreign court will be a court of competent jurisdiction only if the sovereign state voluntarily submitted to the jurisdiction of the foreign court and thus waived its immunity.

Exception (c) gives the Sudanese courts the power to disallow an action of a foreign judgement obtained against a foreign state if the judgement appears".... to be founded on an incorrect view of international law, or the refusal to recognize the law of the Sudan in cases in which such law is applicable". It is clear from the words of this exception that a foreign judgement rendered against a foreign state by a foreign court, and found to be based on the restrictive view of immunity, will neither be recognized nor enforced by the Sudanese courts, since the doctrine of restrictive immunity is not the Sudanese law applicable in such cases.

A similar measure is the Egyptian Judgements Ordinance 1901¹⁰⁵ which was enacted prior to the Civil Justice Ordinance. This

raises the question as to the relation between the Civil Procedure Act 1983 (which has substantially reproduced the provisions of the Civil Justice Ordinance 1929) and the Egyptian Judgement Ordinance 1901. It was argued that an Egyptian judgement will be enforced provided that the conditions laid down in the Egyptian Judgement Ordinance are satisfied as the provisions of the Civil Procedure Act are not relevant.¹⁰⁶ The effect of an Egyptian judgement in any civil or criminal proceedings disposed of by an Egyptian court is expressed in Section 4 of the Ordinance as res judicata in the Sudan.

Section 3 of the Ordinance states that the Ordinance will not apply to any judgement of an Egyptian court being:

.... (b) a judgement against the Government or against any officer of that Government in respect of any official act of such officer

Clearly, then, the sub-section excludes from its scope the recognition and enforcement of judgements of an Egyptian tribunal pronounced against the Egyptian Government or any of its officers acting in his official capacity. In the final analysis, this subsection constitutes authority for the proposition that the Egyptian Government cannot be made a party to any proceedings before the Sudanese courts on the basis of a judgement obtained against it in Egypt, at least under the provisions of this ordinance. However, it should be emphasized that the Sudan has not yet entered into any treaty with Western or other states for reciprocal enforcement of judgements and the domestic legal position relies to a large extent on these provisions, particularly an archaic regime laid down in 1929 when the Civil Justice Ordinance was first promulgated. The Sudan also has not yet acceded to the Arab League Convention on Execution of Foreign Judgement.

Is a foreign arbitral award enforceable in the Sudan? The Sudan is not a party either to the League Convention on the

Execution of Foreign Arbitral Awards¹⁰⁷ nor the Convention on Recognition and Enforcement of Foreign Arbitral Awards.¹⁰⁸ This fact, coupled with the absence of domestic legislation,¹⁰⁹ does not encourage the enforcement of foreign awards in the Sudan.

The ratification of the Washington Convention of 1965 by the Sudan may considerably lessen the foreign investors' degree of frustration as far as immunity from suit is concerned, but nevertheless this advantage is not available in the case of enforcement of an ICSID arbitral award in the Sudan. The question of immunity stands out more clearly in the jurisdiction of the Sudan where enforcement is sought than in other jurisdiction. Art. 55 of the ICSID Convention states that the provision relating to the recognition and enforcement of the arbitral award given in the context of the convention is not to be interpreted "as derogating from the laws in force in the contracting states, relating to immunity from enforcement of the said state or a foreign state". Indeed, if enforcement were sought in the Sudan of an award rendered against the Sudan or one of its public corporations, an award would have to be submitted to the local procedures laid down to this effect. Unfortunately there are no Sudanese local rules nor judicial precedents on this point.

VI. THE FUTURE

The law of state immunity in the Sudan as it now stands is unsatisfactory in most respects. It is largely outdated and its future is unpredictable. However, new developments may persuade Sudanese courts to consider their earlier authorities, developing and adapting the law to new circumstances (including the changing views in international law). Except over a relatively long period of time, the Sudanese courts could not be expected to generate sufficient case-law for this purpose. The main reason seems to be that cases involving issues of state immunities do not arise

frequently in a jurisdiction such as the Sudan, which is not a centre for transnational litigation and arbitration. Again, the Islamization of the Sudanese laws may persuade the courts to adopt new trends and seek guidance from the rules of Islamic law as has happened in other parts of the Muslim world, notably Pakistan, where occasional references to the Islamic approach on state immunities have been made. Indeed, such reference has become mandatory with the introduction of the Sources of Judicial Decisions Act 1983.

A survey of the preparatory works of the various Law Reform Commissions¹¹⁰ does not indicate any prospect of change. There is no reference in the agendas of these Commissions to the issue of foreign state immunities. These Commissions often work under strenuous conditions. Firstly, there is no channel through which the views of judges, lawyers and other observers on certain questions of law reform can be communicated. Secondly, the resources for comparative legal research and studies at the command of the Commission appear extremely meagre. Thirdly, most of these Commissions are politically controlled and the reform of the law is in the hands of officials, and not of an independent body, and thus their initiatives can be overruled by the political intervention of the government. Under these circumstances, it is difficult to imagine that any reform of the law of state immunities might be carried out by the Law Commission.

Indeed, legislation on this subject is highly desirable. It is interesting to note that many of the common law countries, which could not contribute to the development of the law of state immunities, have resorted to the process of legislation to exclude the application of the common law rules, and specifically to put an end to the application of the doctrine of absolute immunity.¹¹¹ But, whether the Sudan Government is prepared to legislate in the foreseeable future is not certain. One could perhaps argue that the work of the International Law Commission may eventually result in an internationally agreed convention, to which the Sudan may subsequently adhere, and review its own legislative position.

References - Chapter Five

1. Agreement establishing A Condominium in The Sudan, Britain and Egypt, 10 November 1898 - 10 July 1899, British and Foreign State Papers, 91, 19-22.
2. Perhaps the best statement of the meaning of the Anglo-Egyptian Agreement on the Sudan is Lord Cromer's explanatory memorandum sent with the draft instrument to Foreign Secretary Lord Salisbury on 10 November 1898, in Great Britain, Public Records Office, FO.78/4975; and Modern Egypt, op. cit., p.33.
3. Cromer's memorandum, ibid.
4. Ibid., II, 115.
5. The Agreement originally excepted the town of Suakin, but even this exception was later removed by the Agreement of 10 July 1899 and Art. 1 of 10 July 1899 Agreement respectively.
6. See Bencini et Quitas contre le Gouvernement Egyptien et le Gouvernement du Soudan, BLJ (1 Dec. 1910), discussed in Chapter 5 supra.
7. See generally Zaki Mustafa, Common Law in the Sudan, An Account of the 'Justice, Equity and Good Conscience' Provision (Oxford: Clarendon Press, 1971); M.I. Khalil, "The Legal System of the Sudan", ICLQ, 20 (1971), 624-44.
8. See, e.g., the statement of Soni, J., in Sabila Fadl v. Ahmed Abdallah Ahmed (1956), SLJR, 62.
9. See, e.g., Electrical and Mechanical Engineering Co. v. Ahmed Fadl El Mula (1958), SLJR, 45; Hassab El Rasoul Hammad v. Mohammed El Amin Ibn Oaf (1956), SLJR, 67.
10. Hassan Abu Murein v. Mukhtar Nurien, ibid. (1956), p.30.
11. Heirs of Hassan Mohammed v. Heirs of Ahmed Fadlalla, ibid. (1956), 23.
12. The Building Authority of Khartoum v. Evangelledes (1958), ibid., p.23; Sudan Government v. Nasr El Din El Sayed (1961), ibid., p.80; Abdel Ghani Ali Mousa Fuhrmeister and Co. (1963), ibid., p.72.
13. Mariam Ahmed Gumoa v. Heirs of Daldoul Bakiet (1966), ibid., p.82.
14. See The Common Law in the Sudan, op. cit., pp.210-2.
15. Ibid., pp.212-7.

16. Sudan Shari'a Law Courts Ordinance, 1902, Sections 6 and 8.
17. Act No. 36 (1983).
18. Act No. 35 (1983).
19. Mohammad Shata Abu Sa'ad, Interpretation of the Sudanese Law in respect of the Sources of Judicial Decisions (Cairo, 1984), p.260 (in Arabic).
20. Mohammed El Bahi v. Egyptian Irrigation Department (1963), SLJR, 77.
21. Conflict of Laws (London, 1955), p.33.
22. Fatima Galdas v. Educational Mission of UAR (1969), SLJR, 172.
23. (1924) A.C., p.172, at p.173.
24. See Agreement between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, 8 November 1959; text in UNTS, 433, 51.
25. El Tayeb Hassan v. The Government of Turkey, Case No. 950, decided on 25 December 1971 by the Omdurman District Court (unreported).
26. 'Agab Ahmed 'Agab v. The French Cultural Centre, decided on 29 October 1975 (unreported).
27. The court referred in its judgement to the following English decisions: The Parlement Belge (1880); The Constitution (1879) and The Porto Alexandre case (1920). H.W. Briggs, The Law of Nations, Cases and Documents and Notes (London: George G. Harrap & Co. Ltd., 1938), was also consulted and some quotations from the above judgements were cited as well.
28. The case was decided by a specially constituted court (State Security Court) in November 1986. Judgement available in manuscript, Khartoum (in Arabic).
29. See Z. Mustafa, The Future of Common Law in The Sudan (Khartoum: University Press, 1969), p.21.
30. See, e.g., B. Awadalla J., in Ahmed Mohamed Ahmed v. Wali Hammad (1960), SLJR (1960), 54; A. Imam J., in Abdallah and Ahmed Abdel Karim v. E.F.E. Debbas, ibid., 236 and Ibrahim Awad v. Nasr Sports Club (Karima), ibid. (1966), 47.
31. See Art. 103 of the Permanent Constitution (now abolished), 1973, op. cit. The Transitional Constitution of The Sudan 1985 provides in Part VI, Art. 35, that "No agreement or convention with a state or an international organization and no decision taken in any international agreement shall have

effect in the Sudan save upon being ratified by law". Text of the constitution in the manuscript.

32. The practice of the Sudan in this field has evolved from various constitutional and republican orders issued in this regard since independence. See, e.g., The Transitional Constitution of the Sudan 1956, Arts. 42 & 67, Special Legislative Supplement to The Republic of The Sudan Gazette, No. 927, December 6, 1958; Constitutional Order No. 1, November 17, 1958, ibid.; The Central Council Act 1962, Arts. 3 & 24, Special Legislative Supplement to ibid., No. 976, 13 November 1962; The Sudan Transitional Constitution (Amended) 1964, Arts. 42 & 46; Republican Order No. 1, 25 May 1969; Permanent Constitution of the Sudan, Arts. 103 & 118, op. cit., and The Official Foreign Contracts and Relations (Organization), Order No. 543, 1976 (Khartoum, Attorney-General's Chamber, 1976).
33. Most of these have been examined in the previous chapter in relation to Egypt.
34. This was the position as at 31 December 1984; see Multilateral Treaties deposited with the Secretary-General, ST/LEG/SER.E/1.
35. See The First Parliament of The Sudan, Proceedings in the House of Representatives, No. 14 (3rd Session), from 26 December - 1 January 1956, Sitting No. 53, 1 January 1956, pp.669-70. See also R.C. Winter, Blueprints for Independence (Amsterdam, 1961), p.274.
36. See The First Parliament of The Sudan, op. cit., pp.670-1.
37. See letter of 29 December 1955, with a Declaration Recognizing the Independence of The Sudan, from the British Foreign Secretary, ibid., pp.671-2. See Materials on Succession of States, UN Legislative Series, ST/LEG/SER.B./14 (1967), p.203.
38. It was the practice of the British Government to prepare a list of all treaties formerly applicable to ex-colonies and to furnish each newly independent state with such a list, with a view to the presumption of their continuity. See D.P. O'Connell, "Independence and Succession to Treaties", BYBIL, 38 (1962), 84. No such list has been made for the Sudan, perhaps because it was under a system of administration other than that of the British colonies.
39. See GBPP (1956) [Cmd. 413].
40. See UAR Ministry of Foreign Affairs Statement with Regard to the Communication between the Sudan and Egypt regarding Treaties formerly applicable in the Sudan, circular dated 3 June 1946.

41. Act No. 10 of 1957, Special Legislative Supplement to The Republic of The Sudan Gazette, No. 910 (25 July 1957), Supplement No. 1.
42. Act No. 11 of 1957, ibid., No. 2; for the text see UNTS, 4 (1947), 275.
43. Act No. 12 of 1957, ibid., No. 3; text in UNTS, 14 (1948), 185.
44. Act No. 13 of 1957.
45. Act No. 14 of 1957.
46. UNTS (1957), 96, 257. Act No. 15 of 1957.
47. UNTS (1950), 75, pp.31, 85, 135 and 287 respectively. Act No. 16 of 1957.
48. UNTS (1950-51), 77, 143. Act No. 17 of 1957.
49. See Chapter 2, supra.
50. The Sudan acceded to this convention on 13 April 1981. See the Multilaterals Deposited with the Secretary-General, op. cit., status as at 31 December 1981, p.36.
51. The Sudan had signed the Final Act and the Convention on 10 December 1982 and ratified the convention on 23 January 1985; see The Law of the Sea Bulletin, Special Issue 1 (March, 1987), published by the UN Office for Ocean Affairs and The Law of the Sea, ILM, 24, No. 4 (1987), Annex. II, 1124.
52. The convention was opened for signature at Washington in March 1965; text in UNTS, 575 (1966), 159. It was signed by the Sudan on 15 May 1967 and ratified on 9 April 1973 with effect from 9 May 1973; see UNTS, 871 (1973), 253.
53. Art. 54(1) of the convention.
54. See G.R. Delaume, "ICSID and the Transnational Financial Community", ICSID Rev.-FILJ, I (1986), 237.
55. The certified text of the Treaty is available in a special file kept by the Ministry of Foreign Affairs (Protocol Department, Treaty Section). The Treaty was ratified in 1971. Ratification of this Treaty was published in DRSG (1971), 1112.
56. Signed on 10 June 1969, approved on 16 April 1970; by the decision of the Council of Ministers, No. 467; published in DRSG on 15 June 1970.
57. The agreement deals basically with technical assistance and cooperation.

58. Agreement between the Government of Canada and the Government of the Democratic Republic of the Sudan concerning Development Cooperation 1979; text in Ministry of Foreign Affairs (Protocol Department, Treaty Section, special file).
59. Agreement between the Government of the Democratic Republic of the Sudan and the Government of The Federal Republic of Germany signed on 3 March 1972 (including amendment of 28 September 1976), ratified by the Republican Order No. 87, 1973; text in Ministry of Foreign Affairs file, op. cit.
60. Agreement of Technical Assistance between the Republic of Italy and the Democratic Republic of the Sudan, signed on 14 April 1976, approved by the People's Assembly at its 32nd meeting on 21 February 1977; text in ibid., and the DRSG, 1977.
61. Agreement between the Government of UK of Great Britain and Northern Ireland and the Government of the Democratic Republic of the Sudan concerning the Provision of Certain Technical Assistance by the U.K., signed at Khartoum, 4 April 1970, ratified by the Council of Minister's decision No. 438 on 11 April 1970, and further approved by the Council of Revolution; published in DRSG of 15 June 1970. Text is also available in Foreign State Papers [Cmd. 4385].
62. See the special file, op. cit., the memo. attached to the Agreement.
63. It should be noted that the ILC has regarded the exception of "personal injuries and physical damage to property" as one of the possible limitations to the principle of state immunity. The issue has been dealt within a scholarly manner by the Special Rapporteur in his Fifth Report, YBILC (1983), Vol. II, Part One, 38-46, paras. 63-100.
64. Answer to Question No. 4.
65. Answer to Question No. 11.
66. Answer to Question No. 13.
67. Answer to Question No. 19.
68. Turiff Construction (Sudan) Ltd. v. The Government of The Republic of The Sudan, an award rendered by The Permanent Court of Arbitration at the Hague on 23 April 1970, NILR, 10 (1970), 200. See also Docs. FL/ATC/4-60, Attorney-General's Chamber (Khartoum, Sudan).
69. The tribunal consisted of Charles Cameron of Ottawa, Mohammed Yusif Mudawi of the Judiciary, Khartoum, and Robert J. Parker, QC, of London.

70. The text of the letter is in a special file kept in the Attorney-General's Chamber, Khartoum, op. cit., Doc. 61.
71. See ibid., Doc. 64.
72. See the instructions sent by The Sudan Government to its counsel in the Netherlands, Messrs Herbert Smith and Co., that they pleaded sovereign immunity before the Hague District Court, ibid., Doc. 71.
73. See Zaki Mustafa, "Public Corporations as Parties to Arbitration, An Arab Perspective", International Arbitration, 60 Years of ICC Arbitration, a Look at the Future (Paris: ICC, 1984), p.251.
74. Stephen M. Schewebel, International Arbitration: The Salient Problems (Cambridge: Grotius Publications Ltd., 1987), pp.87-9, 288-90, at p.89.
75. Amaroco v. Republic of the Sudan, special unclassified file (Khartoum: Attorney-General's Chamber, 1986).
76. See, e.g., The US Court of Appeal decision in Transamerican Steamship Corp. v. Somali Democratic Republic, F.2nd, 767 (1985), 998.
77. See statement by Mr Abdel Rahman, in the Sixth Committee, GAOR, 39th Session, 46th Meeting, p.11, para. 40.
78. Ibid., 40th Session, Sixth Committee, 35th Meeting, p.10, para. 36.
79. For recent international transactions and relevant data on the flow of external resources, see Bank of Sudan, Twenty-seventh Annual Report, 1986 (Khartoum: Printing Centre, March 1987), pp.46-56; Bank of Sudan, Economic and Financial Statistics Review, July-Sept., 1986 (Khartoum: Bank of Sudan, the Statistics Department), Vol. 27, No. 3. For an analysis and evaluation of these data, see IFS (Washington: IMF, 1987), Vol. XL (1987), pp.464-7.
80. There are already a number of enactments adopted by the Sudan in this regard and these will be briefly examined later.
81. For the importance of national legislation as a source of state practice on state immunities, see Sucharitkul, "Preliminary Report on Jurisdictional Immunities of States and Their Property", YBILC (1979), Vol. II, Part One, paras. 24-7.
82. Text in The Laws of The Sudan, Vol. I, Titles I & III; Title I: Constitution, Sub-title I: Interpretation, pp.3-5.
83. S.21 of the Ordinance, ibid., p.5.

84. The same words were later used, with minor modifications, in the Interpretation of Laws and General Clauses 1974, 21.5.74, Act No. 32, 1974, The Laws of the Sudan, Vol. I (revised text).
85. Now abrogated, Authentic English Translation of the Permanent Constitution of The Sudan, issued 8 May 1973, Attorney-General's Chamber (printed by Government Printing Press, Khartoum).
86. Available in manuscript only, and published by the Attorney-General's Chamber, Khartoum.
87. However, the subsequent amendment suggests that Art. 11 be deleted and substituted by the following provision: "Nationals and all other incorporated bodies resident in the Sudan shall be subject to the rule of law".
88. Unofficial translation.
89. Unpublished, available in manuscript, Attorney-General's Chamber, Khartoum.
90. See, e.g., an article by Abdul Wahab Bob, in Al-Siyasa (a Sudanese newspaper), Thursday, 21 August 1986.
91. Immunities and Privileges Act 1956, The Laws of the Sudan, Vol. 1, p.107. However, it should be mentioned that the Act deals entirely with diplomatic immunities and privileges.
92. For a detailed examination of these legislations, see F.A. El Sheikh, Legal Regime of Private Investment in Saudi Arabia and Sudan (Cambridge: University Press, 1984).
93. Ibid., p.52.
94. See the Special Rapporteur, Sixth Report, YBILC (1984), Vol. II, Part One, 21-2, paras. 81-9.
95. There is no express provision in the Ordinance to determine the nationality of the corporation. It appears that the incorporation test is the determining factor. See El Sheikh, op. cit., p.15.
96. See comment on draft Art. 18 by Sucharitkul, Sixth Report, YBILC (1984), Vol. II, Part One, 25, paras. 105-11.
97. Special legislative supplement to the DRSG, No. 1112, 31 December 1970, Act No. 106.
98. These rules were discussed earlier in this study; see Chapters 1 and 2 supra.

99. See Oppenheim, op. cit., Vol. 1, pp.488-92 and Colombos, The International Law of the Sea (London, 1967), p.91, for an exhaustive survey of conflicting views and the respective arguments.
100. See P.C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction (New York, 1927), pp.123-32.
101. See Art. 8(1).
102. Arts. 224-94.
103. These Articles are substantially reproducing Sections 42-4 of the Civil Justice Ordinance (No. 1) May 1929, which was repealed by the Civil Procedure Act 1974 and the Civil Procedure Act 1983 respectively. For a brief account on this subject under the Civil Justice Ordinance 1929, see V.A. Murugasampillay, "The Recognition and Enforcement of Foreign Judgements in the Sudan", SLJR (1969), 251-62.
104. Other defences are (b) the decision was not given on the merits of the case; (d) the judgment is contrary to the principle of natural justice; (e) where it has been obtained by fraud; and (f) where it sustains a claim founded on a breach of any law in force in the Sudan.
105. Law of 1 May 1901, The Laws of The Sudan, Vol. I, Chapter 1.
106. Murugasampillay, op. cit., p.255.
107. Signed at Geneva, 26 September 1927, entered into force since 25 July 1929; text in LNTS, XCII (1931), 301.
108. Signed at Geneva, 29 April 1958, entered into force on 7 June 1959; text in UNTS, 330 (1959), 3.
109. Since the Civil Procedure Act deals only with foreign judgements and fails to mention foreign arbitral awards.
110. Since independence, several law commissions have been established to revise, modify and redraft the Sudanese laws in 1966, 1970, 1977 and 1983 respectively. The Preparatory works of these Commissions are available from the Law Commission Division of the Attorney-General's Chamber, Khartoum. These consist of a number of files with detached reports and records under different titles and subtitles.
111. Apart from the USA and the UK, countries like Pakistan, Singapore, Canada and South Africa have recently adopted this course of action.

PART III

THE ISLAMIC CONCEPT OF STATE IMMUNITY

CHAPTER SIX

THE ISLAMIC CONCEPTION OF STATE AND SOVEREIGNTY

I. THE ISLAMIC APPROACH IN COMPARATIVE PERSPECTIVE

If by international law one understands rules and principles which govern relations between states, the employment of the comparative approach would at first sight appear to be excluded, because rules which are universal in character do not lend themselves to comparison.¹ Nevertheless, international lawyers have discussed at length the link between private law and international law in order to promote the study and development of public international law. A certain amount of attention has been directed to the question of the relevance of private law rules as a source from which public international law may be developed.² It has been shown that a strong link exists between comparative research in private law rules and international law and that research must precede any attempt to codify public international law.³ Similarly, attention has also been devoted by publicists to discussing the contribution of comparative law to the formation of custom and general principles of international law. As far as custom is concerned, municipal law may be regarded as a 'practice' within the meaning of Art. 38(1)(b) of the Statute of the International Court of Justice. Municipal law has been examined by both the PCIJ in the Lotus case,⁴ and the ICJ in the Anglo-Norwegian Fisheries case,⁵ and the North Sea Continental Shelf case,⁶ in order to ascertain whether 'practice' appears to be sufficiently general as an essential prerequisite for a binding customary rule.

The publicists have also assigned a significant role to the comparative method in the exploration of the "general principles of law recognized by civilized nations" and in the application of these principles to international law. That transposition necessarily implies the comparison of municipal law in order to determine whether these municipal rules are in fact recognized by civilized

nations. However, it must be admitted that, despite the theoretical necessity of resorting to a comparative method, the decisions of international tribunals are not well provided with comparative views.⁷ Two reasons are advanced for the absence of comparison: in the first place the general character of these principles is so common, that the judges felt no need to mention them expressly, and reference is often made to natural justice, Roman law or commonsense. In the second place, the comparative method raises the question of practical difficulties concerning the legal systems to be compared.⁸ It may be argued that one of the continuing consequences of the event of recent generation is that all of the major legal systems of the world are now in a period of active growth. Even those systems which, like Islamic law, have passed through a long period of arrested development, have now acquired a new vitality. Therefore the different legal traditions of the world must be taken into account in determining what the statute of the ICJ describes as "the general principles of law recognized by civilized nations".⁹

Since the beginning of this century, new ideological and regional systems of law have been formed, e.g., American international law, European international law, Islamic international law, Soviet international law and the international law of the Afro-Asian or newly independent states. It has been correctly argued that, unless a comparative approach is adopted to this multiplicity of systems, "we may well find that there are as many international laws as there are states".¹⁰

As to the question of comparative research, it has largely been confined to the systems of law founded on Roman law and had little or nothing to do with Islamic law. There is, as Gutteridge observes, a definite value in approaching other legal systems for a comparative method.

If we regard the development of the law of nations in the light of present day conditions, there seems to be no justification for an attitude which would regard Roman law and the modern civil-law systems as the sole source of the principles which can be utilized in order to fill in gaps in international law. 11

To do so, he further argues, is to place a meaning on the phrase "principles recognized by civilized nations" which fails to correspond to the new situations which have arisen since the age of Grotius when the Roman law was regarded as the only source of law and the standard by which justice should be handled".¹²

A contemporary Muslim scholar has claimed that the conventional approach to tracing modern international law back to Grotius has great shortcomings.¹³ He suggests rather that we see it as a continuum, ranging from the Roman period, through the Islamic period, to the present day. He asserts, moreover, that the gap between the Roman period and the publication of Grotius, De Jure Belli ac Pacis, is bridged by the influence of Islamic legal concepts which predate later European codification by centuries, and provide the "missing link" in its development. We can thus expect to find some analogous rules to that of international law in Islamic legal theory. Indeed the most important explanation for this narrow view may be that, in the major part of the history of international law, it has been regarded as primarily European and Christian,¹⁴ although this view has recently been labelled as historically unsound.¹⁵ It has long been the impression that the Islamic legal system has nothing to contribute to the development of the law of nations. Islamic law was regarded as of speculative rather than of practical interest and received attention from relatively few scholars. However, recent exposition of that legal system is beginning to dispel that impression.¹⁶

An examination of the concept of state immunity in the Islamic legal system appears to be valid and of importance for the development of rules of international law on the subject. But in this specific regard, two general propositions can be made. Firstly, in the contemporary world international law can no longer be simply a projection of a group of closely related legal systems based on the civil and common law traditions, but must rest on the broader intellectual foundations necessary to give it worldwide authority in an age which is no longer prepared to accept the

leadership of any one nation, culture, ideology or legal system. Our legal inheritance must henceforth embrace the non-Western legal traditions,¹⁷ including the Islamic legal system. Secondly, the Islamic legal system does in fact contain certain ideas and principles capable of being incorporated into international law.

The concept of state immunity has assumed a significant position in the new international community which is radically transformed and influenced by various political, economic and social factors. In the light of this change, the task which now confronts international lawyers is that of:

achieving an intellectual revolution, corresponding to the political and social changes of outlook in other branches of knowledge which will give us a legal system with sufficiently broad and deep foundations to command the allegiance of a world community with a fundamentally changed composition and distribution of influence. 18

It must be stressed that what is intended here is not simply to present the similarities which exist in both international law and the Islamic legal system on the doctrine of sovereign immunity, but to show the different intellectual approaches to this doctrine. The need for a similar outlook has also been cogently stated by Sohn in the following words:

We would need to assemble from non-Western countries historic, diplomatic and legal precedents seldom available in generally accessible languages. We would need to leave the narrow confines of studies comparing merely the principal Western legal systems and to acquire a more different knowledge of non-Western laws and customs. 19

Such a comparison can contribute to the development of international law generally, and in particular in that of state immunity, in several ways.

Firstly, states often adhered to their legal conceptions and seldom changed them when they came into contact with other states. If a state is accustomed to a rule of law in national affairs, it will accept it as normal and desirable in international affairs.²⁰ The mental habits developed by legal systems of different customs and varying traditions may produce an essentially similar result. When, for example, it was found that the concept of absolute sovereign immunity is alien to the whole spirit of the Islamic legal

system, this was clearly highly relevant for the attitudes towards the concept of immunity in international law which may be expected of, or encouraged among, states belonging to that legal system. When it was found that, under the tenets of Islamic law, the law binds the governor no less than the governed, this was likewise relevant to the better understanding and development of the concept of state immunity in international affairs. Consequently, if we find that the Islamic legal system, under which one-fifth of the population of the world live, opposes the concept of sovereignty as an absolute in national affairs, we can approach the international rules on the subject in a greatly improved climate with much higher hopes of a large adherence to that concept in international law and thus contribute to the development of the emerging customary law on the subject. Secondly, the examination of the Islamic concept of sovereign immunity is also relevant to other legal fundamental issues such as the binding nature of the rules of international law. The comparative method is of particular relevance when "the general principles of law recognized by civilized nations", as provided for in Art. 38(1)(c), are at issue.²¹ Without entering into a detailed discussion regarding the meaning of the phrase "civilized nations"²² it may be observed that there is a fair amount of agreement among publicists that that phrase includes principles of different legal systems of the world at large. The majority of jurists:

take the line that general principles recognized in international law constitute a reservoir of principles which an international judge is authorized by Article 38 to apply in an international dispute, if their application appears relevant and appropriate in the different context of inter-state relations. 23

These general principles can only be found by comparing the various legal systems in the world. It necessarily implies an essentially comparative method without which such general principles cannot be discovered and ascertained and eventually transposed into international law. The significance of the resort to such comparison becomes highly desirable if the problem in question is not sufficiently regulated by custom and treaties, as in the case of sovereign immunity which has not yet been settled by custom or international convention. The general principles can thus play an important role in shaping both the broader rules and the specific details of that law.

Thirdly, the comparison of the Islamic legal system will reveal that the concept of sovereignty and the doctrine of state immunity are both based on the idea of the rule of law, owing to the supreme position which the law occupies in the Islamic state. The state's sovereignty is subject to the law and not above it. It is well known that the idea of sovereignty as a power which is beyond legal control is one of the obstacles to the supremacy of international law and seriously impairs its authority. Thus, one might reasonably expect states affiliated to that legal system to accept as natural the rule of law in their international intercourse and hence to minimize the consequences of rigid adherence to the absolutist conception of sovereignty, which has increasingly been regarded as anarchic and inconsistent with international society. Such are the general considerations on which the validity of such a comparative study is based.

It must be emphasized that comparison is not intended here as a descriptive method but is intended as a comparison as to spirit and conception. In the words of Lord Macmillan:

No-one can address himself to the study of comparative law without being struck with the essential similarity of the problems of human relations the world over and, despite the diversity in the forms of solution which each national system of law has devised, with the general resemblance in substance of these solutions. 24

This observation is highly relevant since it came from a man with unique experience in different legal systems derived from his career as a judge in the judicial committee of the Privy Council which had a jurisdiction throughout the old British Empire and Commonwealth.

The value of the comparative method depends largely:

on its employment as a corrective to any tendency there may be on the part of international judges or lawyers or on the part of the draftsmen of treaties to employ concepts or rules which either belong exclusively to a single system or are only to be found in a few of such systems. 25

The possible consequences of any similar trend has been expressed by Lauterpacht in the following words:

To attribute to one system of a particular time and space the qualities of a universal law and to see in it a vehicle of the

To attribute to one system of a particular time and space the qualities of a universal law and to see in it a vehicle of the development of international law, may well result in checking that development. 26

In an attempt to outline the Muslim position regarding sovereign immunity, one is faced with a host of problems, not least of which is the fact that so many relevant works are available only in Arabic. What is attempted here is a simplified explanation of some of the most important ideas in the Islamic legal system that pertain to the problem of sovereign immunity. Sovereign immunity, with all its complexity, has certain generally agreed bases. These clearly relate to sovereignty, state functions and jurisdiction. An examination of these precepts in the Islamic legal system merits primary attention.

II. THE SOURCES OF THE ISLAMIC LAW OF NATIONS

Before discussing the ideas of state and sovereignty in Islam in any detail, it may be useful to mention briefly the sources from which these ideas are drawn and their nature.

The Qur'ān:²⁷ The Qur'an is the first source of law in point of time no less than in point of importance. To Muslims, it is the very word of God. Nothing that contradicts the Qur'ān is permissible.²⁸ It is the original primary basis and most fundamental source of that law. It differs from positive law such as statute and legislation in that these are the creation of human will.²⁹ To this extent, the Qur'anic injunctions consist mainly of broad and general propositions as to what the aims and aspirations of Muslim society should be.³⁰

The Sunna: The second source of Islamic law is the Sunna which has been defined as sayings, deeds and tacit approval which are related to the Prophet Mohammed. The bulk of the rules of law have been drawn from the corpus of the Sunna and includes the treaties made by

him and the charters and decrees he promulgated from time to time, as well as injunctions issued to the commanders on the battlefield. The authority of the Prophet comes next only to the Qur'ān because the Qur'ān itself bestows legislative and interpretative authority upon the Prophet.³¹

Beside the Qur'ān and Sunna which provide the basic norms and rules, there are auxiliary sources. These are simply methodological legal devices to help jurists extract and posit legal rules from the primary sources. This leads us to the third source of the Islamic law of nations, namely Ijtihād or the opinion of jurists.

Opinion of jurists: Freedom of juristic reasoning in the solution of problems not specifically regulated by the primary sources is almost unfettered.³² According to this freedom of expression of personal opinion, the opinion of jurists becomes an important source of Islamic law generally. However, it should be mentioned that the significance of jurists in Islamic society goes far beyond that of jurists as such. They are more like a class, serving Islamic law in other ways than simply a profession, since the sphere of law is much wider in Islam than would be recognized in other legal systems.³³

The authoritative jurists³⁴ have a very significant role in Islamic law. They developed the science known as siyār or international law, which was a part of general jurisprudence and laid down elaborate rules of war and peace governing the relationship of Muslim and non-Muslim states before Europeans and others wrote their treatises on modern international law.³⁵ The exercise of personal reasoning by jurists is not a single thing of one specific source. It may be qiyas (reasoning by analogy), maslahat mursala (public interests), istihsān (seeking the most equitable solutions) or istislāh (seeking the best solution for the general interests). The jurists have used qiyās to deal with some of the problems which have arisen in international relations. The process entails analogical deduction from what has been reported in

the Prophet's traditions. Again, they employed the concept of general interests to face the new problems arising from the contact between Muslim and non-Muslim states. This concept of general interests, according to their view, was wide enough to embrace all of the problems which might arise in the course of that relationship. The basic juristic norm on which they based this process was that the Shari'a (Islamic law) was devised for the interests of the people, i.e. bringing into being what was in the interests of the community, and avoiding what was not. Accordingly, they maintained that all issues of international relations can be measured by this formula.

The caliphs' practice: The practice of the four first caliphs, generally known as the "rightly guided caliphs", is also considered an additional subsidiary source of the Islamic Law of Nations. There are strong reasons for accepting the practice of the highly guided caliphs as precedents of the Islamic Law of Nations and to recognize their legal authority. These caliphs, being among the foremost companions of the Prophet, were in a position to know his practice on matters of international law more thoroughly than others. Secondly, they strictly followed the Shari'a in both letter and spirit during their own caliphates, diverging from it only when strong reasons, backed by legal evidence, were to be found.³⁶

Custom: Another important source of law is custom. Islamic law admits 'urf (literally "what is known" about a thing, and so constitutes "custom"). It does not recognize the criterion of customary practice because it is concerned only with the systematic foundation of the law, not its true historical origins.³⁷ The Qur'ān recognizes custom as a legal principle of subsidiary and supplementary value in the form of the principle of "avoiding hardship". The Qur'ān says: "He has chosen you and has imposed no difficulties upon you".³⁸ Accordingly, it is maintained that, to prevent the people from practising certain customs without justification, is tantamount to imposing difficulties upon them. The Sunna has also embodied and ratified many norms of pre-Islamic

Arabian customary law concerning diplomatic immunities, and certain treaties which are not incompatible with Islamic laws and the status of foreign traders in a Muslim state.³⁹

Treaties: Treaties are another important source of law. Concluding treaties with non-Muslims is permitted by the following verse of the Qur'ān:

How can there be for the polytheists a treaty with Allah and with his apostles, save those with whom ye have made a treaty at the sacred Mosque, so as long as they act uprightly by you, do ye act uprightly by them; verily Allah loves those who fear. 40

This precept was unequivocally supported by the Prophet's practice in concluding a number of treaties with non-Muslims, and followed by his successors.⁴¹ The jurists unanimously agreed that treaties, once concluded, were binding on a Muslim state, unless the object of the treaty or its terms were contrary to the express injunctions of the Qur'ān and the Sunna.⁴² They also agreed that the principle of pacta sunt servanda, as commanded by the Qur'ān, is of general application unless otherwise specified.⁴³

It can thus safely be said that the Islamic Law of Nations is part of the corpus of Islamic law, just as the original jus gentium was a branch of municipal Roman law.⁴⁴ It has been maintained that the sources of the Islamic Law of Nations, if taken in a modern context, conform generally to the same categories defined by modern jurists in Art. 38(1) of the Statute of the ICJ, namely agreements, custom, authority and reason, whereby the Qur'ān and the Sunna represent authority, principles derived from treaties falling into the category of agreement. Local practice, equivalent to custom and juristic writings of Muslim scholars, represents reason.⁴⁵ But on careful examination of Art. 38(1), it becomes difficult to perceive any 'source' which could be equivalent to authority. If the term 'authority' could be assumed for "judicial decisions as sources of legal authority", then the recognition of such decisions as authority for the law is limited by the effect of Art. 59 of the ICJ which provides that the "decision of the court has no binding force except between the parties and in respect of that particular

case". Moreover, if 'reason' is regarded to be equivalent to the teaching of the most highly qualified publicists, it would be appropriate to note that these teachings are mentioned as "subsidiary means" of determining the law.⁴⁶

At this stage of the development of the law, the role of the writers in international law seems to be shrinking.⁴⁷ In the Islamic legal system, the opinions of jurists are regarded as auxiliary sources of law which can supplement the primary sources of the Islamic Law of Nations. Despite their methodological status as a secondary source, the opinion of jurists was influenced both by the development of the law generally and the Islamic Law of Nations specifically, as this was "derived from custom and reason rather than from other conventional sources".⁴⁸

III. THE ISLAMIC CONCEPT OF STATE AND SOVEREIGNTY

1. Internal Sovereignty

The concept of sovereignty as one of the bases of the modern state was first enunciated by Jean Bodin in his work, Six Livres de la Republique, published in 1576.⁴⁹ His theory of sovereignty furnished a theoretical and legal justification for the gradual extension of the powers of the French kings over their feudal lords. "Majesty of sovereignty", Bodin declared, "is the most high, absolute and perpetual power over citizens and subjects in a commonwealth that is to say, the greatest power to command",⁵⁰ and this has been largely followed by modern writers.⁵¹

It is well-known that the notion of absolute sovereignty is the key concept of the absolutist theory of the state in modern jurisprudence and international law. The novelty of Bodin's, and to a degree, Hobbes's, conception of sovereignty lays down three related points.

i- Sovereignty was regarded as being essentially legislative in character. The power of the ruler is often discussed in terms of the prerogatives of the crown, referring to a collection of rights and duties attached to monarchy or rulership.⁵² The most important of these rights is the power to make law.⁵³

ii- The concept of sovereignty was seen to be essentially a matter of logic. If something was supreme and the source of civil law, then the law was the will of the sovereign who thus could not be subject to it. If the sovereign were subject to the law, he would no longer be the source of it and therefore not a sovereign.

iii- The final and most distinctive element of the concept in modern theory is the identification of the sovereign with the state, an identification so obvious that the immunity of the local sovereign was later extended to cover the case of foreign sovereigns with whom foreign states have subsequently been identified.

There are other novel features,⁵⁴ but these are the more dominant ones.

In the Muslim legal system, the law is regarded as sacred and eternal. But, since "men are the enemies of each other",⁵⁵ as the Qur'ān has revealed, society cannot survive without authority. The divine legislator did not rule directly over the people. It became necessary to delegate that authority to a human ruler to represent the divine authority on earth, to provide tranquillity, stability and continuity. Thus, in Islam, as in Medieval Christendom, Muslim jurists think of sovereignty as a concrete object, in contrast to modern writers who approach it as an abstract theory. Some of the contemporary Muslim writers subscribe to the view that sovereignty in Islam ultimately lies with, and belongs to Allah (God),⁵⁶ relying on the Qur'ān, which states: "Say: O Allah! Lord of power and rule, thou givest power, to whom thou pleasest in thy hand is all good. Verily over all things Thou hast power".⁵⁷ According to this theory, whoever actually assumed this sovereign status, whether an individual or an institution of people, was merely a trustee for what Allah had given them. In other words, de jure

sovereignty belongs to Allah while only de facto sovereignty is delegated to human authority and this must be exercised according to the dictates of God.⁵⁸

Some other writers, however, hold that the sovereignty of God cannot operate in human society because God cannot be an immediate ruler in the political and substantive sense. According to them, it is not God but God's law which provides the basis of sovereignty.⁵⁹ This may be described as akin to the European concept of law, except that in the Islamic legal system the primary rules of law are divine given.

After his election, the first caliph, Abu Bakr, enunciated the nature of the relationships between the ruler and the ruled and stressed the subordination of the state to the Shari'a (Islamic law). In his inaugural address, he declared himself not to be a master but a servant of the state and, as such, he was open to criticism and correction. He said:

I have been elected but not the best among you. If I do good, support me; if I err, then set me right. To tell truth to a person commissioned to rule is a faithful allegiance; to conceal and lie is a treason. In my sight the powerful and the weak are alike. By Allah! he that is weaker among you, shall be strongest in my sight, until I shall have redressed his wrong; and he who is strong, is weakest in my sight until he conforms to the law and I have taken from him that which he has wasted obey me as long I obey God and his Apostle, and if I withdraw from God and Apostle, you withdraw from me, as in that case, obligation of obedience on your part to me, terminates. 60

Thus the ruler or the person entrusted with the sovereign authority must rule according to the Shari'a and maintain the faith in word and deed. It is of course the primary duty of the head of the state to safeguard the interests of the state, but in this regard he must always act within the framework of the law. The ruler in Islam, although in practice the holder of divine authority, is not, in contrast to modern authority, above the law, both he and the state are the instruments by virtue of which the law is enforced.

Another basic principle of sovereignty in Islam is that the government is a trust from God to a human sovereign. The traditions of the Prophet clearly declare: "It [the headship of the state] is a trust and surely on the day of judgment it will be a source of shame for those who took it with trust and gave it full rights".⁶¹ The same view was also stressed by the Prophet's successor. It was put authoritatively by 'Umar, the second caliph, in his letter to his governor at Basra, when he wrote:

People have an aversion from their rulers, and I trust to Allah that you and I are not overtaken by it, steadily and unexpectedly, or by hatred conceived against us. See to the execution of laws even if it be for only one hour of the day, and if two matters present themselves to you, the one godly and the other not, then choose as your portion the way of God open your gate to them [the governed] and give heed in person to their affairs, for you are but a man among them except that God has allowed you the heaviest burden. 62

The scope of legislation by the government in Islam is also limited because the burden of law-making is with God. It is not for man to grade his ruling as more or less important. As mentioned earlier, the basic rules are determined by the Qur'an and the traditions. The only area of laws in which human interference is allowed is that where lack of information incapacitates man from the knowledge of God's detailed rules. Consequently, it can be said that the basic assumption of the Islamic juridical theory of the state is that the authority, regardless of who may be entrusted with its exercise, must be derived principally from a divine source. The profound difference between Islamic theory and modern jurisprudence is that the state in the latter searches for its sovereignty after its birth, whereas the state in Islamic theory is established according to pre-determined rules, namely the Shari'a. Those who assume responsibility of government must do so according to the basic principles laid down by this very pre-determined law and they have no right to act outside it. However, it is not advocated that the Islamic state is a theocratic state. By theocracy we generally mean a form of state that functions under divine authority, i.e. a government which recognizes God as supreme ruler in civic affairs and accepts his revelations as the basis on which state and society must be built. An Islamic state cannot be

described as a theocracy because theocracy is often identified with the endeavour to invest a priestly hierarchy with supreme political power, for the simple reason that in Islam there is no priesthood or clergy, for every adult Muslim has the right to perform every religious function. Nor could any person or group of persons legitimately claim to possess any special sanctity of the religious functions entrusted to them.

It is important to emphasize that God has never been regarded as the immediate ruler in Islam; only his representatives on earth are the real executives. It was therefore the divine law, or the sacred code, regarded as the source of governing authority, which was the essential feature in the process of control under such a nomocracy system. This is what is called the divine homocracy. Majid Khadduri came very close to this with his theory that the Islamic community found its most highly developed expression in law rather than in theology. He quoted the Oxford Dictionary's definition of nomocracy as "a system of government based on a legal code; the rule of law in a community".⁶³

In the above discussion an attempt has been made to throw light on the concept of internal sovereignty in Islam as distinct from the modern conception of sovereignty. The main landmarks of the Islamic conception may be briefly summarised in the following points:

- 1) In Islam, sovereignty is not regarded as legislative in character. The ruler or the head of state has no prerogatives, nor any collection of rights and duties attached to his rulership. In Islamic theory both the ruler and ruled are equally bound by the divine law, and the powers of the ruler are derived from and defined by that law, with which no human power can interfere.

- 2) The logical implication evolved by modern thought that the sovereign could not be bound by law is unthinkable in Islamic theory since he had no right to make the law in the first place, and thus the law cannot be his command. The Islamic theory even rejects any

form of mixed or shared sovereignty (shared or mixed between the ruler and God) as a contradiction in substance as well as in terms.⁶⁴ The sovereign can neither make nor break the laws.

3) In Islamic theory, the state is not synonymous with the human or de facto sovereign. The divine law gives to the ruler the right to rule as an agent, and in this respect crudely corresponds to Hobbes' idea of "unity of the representer" theory⁶⁵ and runs counter to that of Austin, who conceived this power to be absolute.⁶⁶

In view of the above-mentioned assertions, there cannot be in Islam a state which can conform to Austin's or Hobbes' definition of sovereignty. To quote H.A.R. Gibb:

The Head of the Umma is Allah, and Allah alone. His rule is immediate, and his commands as revealed to Mohammed, embody the law and the constitution of the Umma. Since God is himself the sole legislator, there can be no room in Islamic political theory for legislation or legislative power, whether enjoyed by a temporal ruler or by any kind of assembly. There can be no 'sovereign state' in the sense that the state has the right to enact its own law though it may have some freedom in determining its constitutional structure. The law precedes the state, both logically and in terms of time; and the state exists for the sole purpose of maintaining and enforcing the law. 67

2. Legal Basis of International Relations in Islam

In order to determine the Muslim position regarding sovereignty in its external manifestation, it is necessary to turn our attention to the concept of the jihād. The attitude held by some non-Muslim scholars is that the doctrine of jihād is the sole basis for external relations in Islam, and that the centuries of interaction in the past between the Islamic world and non-Muslim states on an international plane was based solely on unilateralism.⁶⁸ It is important to note from the outset that jihād actually means striving, not necessarily war. Muslim jurists have distinguished four types of jihād: that of the heart, of the tongue, of the hands, and finally that of the sword. The jihād, in the broad sense of the term, did not necessarily call for violence or fighting, even although a state of war existed between Islamic and

non-Islamic territory, since Islam might achieve its ultimate goals by peaceful as well as violent means.⁶⁹

It is true that in classical legal literature Muslim jurists used the word jihād as a synonym for the word fighting.⁷⁰ But this fighting denotes only one aspect of jihād which encompasses the struggle against evil in whatever form or shape. The Qur'ān prohibits war in every form save in the fulfilment of a religious purpose, namely the protection of faith. The Qur'ān requires that Muslims must be just and kind to those who do not fight them or drive them out of their homes:

Allah forbids you not with regard to those who fight you for [your] faith, nor drive you out of your homes, from dealing kindly and justly to them, for Allah loveth those who are just. ⁷¹

Permission to fight is given to Muslims "against those who fight against you". Muslims are prohibited from committing aggression and the ethical-legal sanction of this lies in the admonishing sentence revealed in another verse "Allah loveth not the aggressor".⁷²

From the above Qur'ānic verses, it is clear that permission to fight is not an unconditional one. Muslims are allowed to fight only if the enemy fights them; they must cease hostilities if the enemy does.⁷³ If the sole reason for fighting was to establish Islam's supremacy on earth, then the injunction to cease hostilities if the enemy desists from persecution, tends to detract from the achievement of this objective through violent means.

In essence one can distinguish two main attitudes to the doctrine of jihād: the attitude of some classical jurists and the contemporary attitude - which reflect differences in Islamic thinking about international relations. To understand both states, it is necessary to mention that the classical Muslim jurists divided the world into two spheres: dār al-Islām and dār al-harb. The former comprised Islamic and non-Islamic territory held under Islamic sovereignty. It is defined as: "the land in which the legal code of Islam is in effect and in which the ceremonial

activities of the religion are observed".⁷⁴ On the other hand, dār al-harb (the outside world) is the territory which is characterized by three elements i) the observance of the non-Islamic code; ii) the proximity of non-Muslim territory; and iii) the absence of amān or safety which is guaranteed by the Islamic state to all of its subjects.⁷⁵ Other classical Muslim jurists have added another category of foreign state, namely, dār al-Sulh or dār al'ahd, which strictly speaking is not under state sovereignty yet is in tributary relations to it.⁷⁶ Faced, thus, with the controversial exposition of the doctrine of jihād, the traditional view held that a state of war exists between the two territories and peace is only temporary.

Islam's theory of international relations by necessity had undergone changes on the basis of historical experiences. The transition which thus occurred has been attributed, according to Khadduri, to three main factors. The first was the replacing of the classical doctrine of jihād as the permanent state of war between Islamic and non-Islamic territories with the adoption of the principle of peaceful relationships among nations of different religions. As fragmentation of the Muslim world took place (roughly from the 16th to the 19th century), Muslim rulers began to make treaties establishing peace with non-Muslim states. The year 1535 marked a significant turning point in this process, for it was then that Sultan Sulayman the Magnificent and the King of France made a treaty of peace and mutual respect.⁷⁷ Other European rulers were invited to adhere to this treaty if they so wished. The treaty was important both as a recognition by Islam of nations of different religious and also as a step in the movement towards the incorporation of both Muslim and Christian states within a single community.

The second factor was the principle of separation of religious doctrine from the conduct of external relations. The relegation of Islam to a domestic level arose owing to a schism in the Muslim world which occurred at the beginning of the 16th century when it split into three zones: Ottoman, Persian and Indian. Gradually

the principle of eius regio, eius religio became the basis of governing, first the relations among the Christian states of Europe, and later among the states of different religions throughout the world.

As to the third important factor, Khadduri points to the adoption by Islam of the principle of territorial sovereignty, as a result of the territorial segregation mentioned above. Whereas previously allegiance had been to symbols of religious unity which transcended any territorial boundary, loyalty was now directed to individual states.⁷⁸

At any rate there seem to be two trends in contemporary Islamic thought relating to international relations. First, the trend that is founded on a nationalist basis, and this is very clearly reflected in the fact of the League of Arab States which follows closely the modern conception of sovereignty. The League, formed in 1945, was set up to foster inter-Arab cooperation in the fields of security, economics and social matters. The League has as its purpose, "the strengthening of relations between the member states and to safeguard their independence and sovereignty:". ⁷⁹ Secondly, the proliferation of Islamic conferences and summits in recent years would suggest that, rhetorically, at least some of the old universalism remains. But perhaps in some sense Islam remains a "diplomatic family", like the commonwealth, in this particular regard.⁸⁰

As early as 1966, a number of Muslim states put forward the idea of holding an international Islamic conference, in which non-Arab Muslim countries could participate. Efforts in that direction culminated in the organization of an Islamic conference to discuss international development and problems affecting the Muslim world. This new trend, called neo-Pan-Islamism, is not aimed at the restoration of Islamic unity, as was the Pan-Islamic movement in the 19th century, nor does it indicate a desire to reinstate the exercise of the traditional Islamic system in international relations. Rather, it is an inspiration to cooperate as an Islamic

bloc within the community of nations. Thus, in contemporary international relations, the Muslim states have come to accept the present-day idea of peaceful co-existence.

The trend towards accepting the reality of present-day world order is reflected in the Charter of the Organization of Islamic Conference (OIC).⁸¹ This charter specifically enshrines as basic principles sovereignty, equality and non-interference. In order to realize the objectives of the Charter, member states have undertaken to be "inspired and guided by the following principles":

- 1) total equality between member states;
- 2) respect of the right of self-determination, and non-interference in the domestic affairs of member states;
- 3) respect for the sovereignty, independence and territorial integrity of each member state;
- 4) settlement of any conflict that may arise by peaceful means such as negotiation, mediation, reconciliation or arbitration;
- 5) abstention from the threat or use of force against the territorial integrity, national unity, or political independence of any member state.

These principles, which enjoy the unequivocal and collective endorsement of the Islamic states, could be said to form the basis of Islamic international relations today. These principles are enshrined in the UN Charter despite minor variations, and there is overwhelming authority to the effect that these principles are widely recognized as general principles of international law.⁸²

Consequently, it is possible to conclude that the classical theory of international relations, based on jihād, expounded by some classical jurists, and restated by modern non-Muslim scholars, is neither sanctioned by the provisions of the Qur'ān, nor is it explicitly recognized by the Sunna. The practice of Muslim countries in today's international relations reveals consistent acceptance of the universal community of nations based on legal equality and reciprocity. Such acceptance of general principles of international law by Islamic states is not contradictory to the legal basis of external relations in Islam.

IV. THE CONCEPT OF JURISDICTION

In order to discuss the concept of jurisdiction over foreigners under the Muslim legal system, a distinction must be made between dhimmis and musta'mins.

1) Dhimmis are non-Muslims accepted as being in hegemony with the state. Their consent takes the form of dhimma, an agreement by which the rights and duties of both parties are determined. They are regarded as subjects of the state and not as aliens and, on payment of an annual capitation tax (jizya), the dhimmis receive a pledge of security and protection from the Islamic state.⁸³

2) In contrast to the dhimmis, the musta'mins are non-Muslim aliens who have entered the Islamic state for a limited period, and whose status is governed by the terms and conditions upon which the permission to sojourn was granted. Even with regard to subjects of a belligerent state, the Islamic state has ordained its full protection once a posteriori permission had been granted and the bona fide status of the visitor established. A sojourner was termed a musta'min (holder of a covenant of protection), capable of having rights and being liable to duties. Musta'mins have complete liberty to enter and leave the Islamic state; and, as a musta'min, his person is inviolable and his property protected.⁸⁴ Once amān (safe conduct) has been granted, it is binding on the state and cannot be forfeited unless such permission turns out to be prejudicial to state security or its public law and order.⁸⁵ Even the resumption of active hostilities between the Islamic state and the state of origin of a musta'min is considered no reason to declare him an enemy alien, cancel his amān and confiscate his property so long as he did not openly help the enemy by spying for them, or exporting weapons, war materials and goods to strengthen the enemy. The significance of the legal device of amān in the past must not be underestimated. It was important both for Muslims and non-Muslims as it served as a 'passport' to facilitate contract trade and exchange of commodities.⁸⁶ Indeed, this legal device is

considered to be relevant even in modern times. The extent and far-reaching character of this concept can be seen from a recent decision rendered in the High Court of Pakistan in State Bank of India v. The Custodian of Evacuee Property.⁸⁷ Following the outbreak of war between India and Pakistan in 1965, Pakistan confiscated certain property as belonging to 'enemy aliens'. The plaintiff sued the administrator of the rights and assets concerning this property. In the first instance, the court held that the plaintiff had no locus standi since he was found to come under the definition of 'alien enemy' in accordance with Section 38 of the Civil Procedure Code of Pakistan. On appeal, the High Court reversed the decision of the lower court and applied the classical concept of amān as part of the body of Shari'a, in addition to the express statutory provisions which failed to cover the facts of the case adequately.

The High Court examined the law of war and peace, with special reference to enemy subjects according to the Islamic legal system. It held that amān "is a pledge of security by virtue of which an enemy alien would be entitled to protection while he is in dar al-Islam [territory of Islam]". The court also supplemented the provision of the Civil Procedure by applying Shari'a when it observed that: "no procedural technicality can take away the right of a musta'min". The core of the concept of amān in Islamic jurisprudence has been summarized by the court as:

.... enemy aliens when under express or implied aman cannot be deprived of their rights as to property and to deal with it
.... subject, of course, to the conditions that the exercise of such rights does not directly or indirectly add to the war potential of the enemy. 88

Accordingly, the court held that the plaintiff was a holder of amān and without having violated the conditions of that amān had locus standi to bring the action.

As a general rule, a Muslim state enjoys the right of jurisdiction over its natural born subjects whether Muslims or dhimmis, and must'amins (aliens) resident in, or passing through, its territory until such persons have changed their status in a

manner recognized by Islamic law. However, a distinction cannot be easily drawn here between jurisdiction and applicable law. This is because, firstly, private international law in Islam is an integral part of Islamic jurisprudence and derives its authority not from any foreign source but from the sovereign will of the Muslim state itself, which will is subject to the same divine law. Early Muslim international lawyers amalgamated both public international and private law and dealt with details of both in the same works on Siyar.⁸⁹ Secondly, discussion of private law rules is necessary, since the question of exemption from local jurisdiction always began from a private claim in which one of the parties invokes a remedy governed by a private international law rule. Thirdly, examination of some of the concepts of private international law is highly relevant for the purpose of our discussion, since it is one of the aims of this section to refute the long-held impression that Islamic law is eminently personal in character, an idea which is mainly derived from the regime of the capitulations which appeared as a complete system in the Islamic world towards the end of the 18th century. These capitulations, as we have seen, for example in the case of Egypt, extensively limited the sovereignty of the Muslim state in favour of foreign states and their nationals. These privileges were further extended to others, especially Christians, and some Muslims who had resorted to foreign protection to escape the jurisdiction of the state courts.⁹⁰

In the light of the foregoing considerations, it may be useful to refer briefly to some private law rules which often involve compression and simplification of a vast body of rules, and which could be usefully treated as an independent science. This is an attempt to substantiate the above-mentioned assertion - nothing more.

This section is accordingly arranged in several subdivisions which cover the various aspects of jurisdiction in Muslim state courts: the general rules governing jurisdiction and applicable law in civil transactions, jurisdiction on fiscal matters and jurisdiction over foreign armed forces. The term jurisdiction

is used in its broad sense, to include not only jurisdiction over court litigation but also jurisdiction of other executive and administrative organs.

1. The Competence of the Muslim Courts to assume Jurisdiction in Civil Cases involving Non-Muslims

In principle, the Muslim judges have jurisdiction in suits arising between a Muslim and a non-Muslim, between two dhimmis belonging to the same community or cases concerning scriptuaries of different communities. However, the question has raised a doctrinal discussion of great importance among Muslim jurists. The opinions expressed by the various schools of law are summarized as follows:

(a) The Shafi'ites

According to the shafi'i school, in a civil suit between a Muslim and a non-Muslim the Muslim judge is required to exercise jurisdiction, whether the non-Muslim party is a dhimmi or a musta'min, whether the subject matter of dispute is marriage or otherwise, and whether the Muslim appears as plaintiff or is being sued as defendant.⁹¹

If both parties are dhimmis of the same creed, the most authoritative view in the shafi'i school is that the judge must also apply his own law since it is the duty of Muslims to protect the dhimmis and to see that justice has been rendered in their disputes. But if they are dhimmis of different communities, the unanimous view of the shafi'ites is that the Muslim judge has jurisdiction and Islamic law should be applied, whether the suit was brought before him by both or by only one of the parties. But, if both parties to the dispute are musta'mins, the judge can only assume jurisdiction if they agreed to bring their suit before him and to abide consequently by his decision. If they did bring the suit before him, the Muslim judge had a choice either to assume jurisdiction or

to decline. They based their opinion on the verse of the Qur'an which reads: ".... if they do come to thee, Either, judge between them or decline to interfere".⁹²

(b) Hanbalites and Malikites

According to the Hanbali and Maliki schools of law, both plaintiff and defendant must agree to bring their suits to the Muslim judge in order that he may assume jurisdiction. If they so agreed, then the Muslim judge has the choice to try the case or decline to intervene.⁹³

(c) The Hanifites

In cases other than personal status, non-Muslims and Muslims are both subject to the jurisdiction of the Muslim courts. The Muslim judge has jurisdiction even if the suit is brought by only one of the contestants. They based their view on the following verse of the Qur'an: ".... so judge between them by what God hath revealed".⁹⁴ On the other hand, in cases involving marriage and divorce, Abu Hanifa required that the Muslim judge has jurisdiction only if the parties had agreed to bring the suit before him, while his disciples Mohammad, Abu Yusuf and Zufar differ from their teacher by making it a duty on the Muslim judge to try the case even if the dispute was submitted to him by only one of the parties.⁹⁵

These are the main differences of opinion among the various schools of jurisprudence on the question of the competence of Muslim judges in cases in which non-Muslims are involved. The better view seems to be that the Muslim judge must try the case whether the parties are dhimmis or musta'mins if they submit to his jurisdiction. It is not necessary that both parties agree to bring their suit before the Muslim judge, as it is sufficient if the matter is brought to his cognizance by only one of the parties.

i. The verse of the Qur'an which states: "If therefore they have recourse to thee, then judge between them, or decline to intervene"

is a repealed (mansukh) provision.⁹⁶ The choice in this verse was replaced by another provision of the Qur'ān which reads: ".... if any do fail to judge by [the light of] what God hath revealed, they are not better than unbelievers".⁹⁷ If a Muslim judge declined to interfere in suits between non-Muslims, he surely failed to judge by what God has revealed.⁹⁸

If this argument is accepted, then the Muslim judge must try the cases between non-Muslims, whether dhimmis or musta'mins, without the requirement that both parties should have agreed to submit to his jurisdiction, as in disputes between Muslims. The provision of the Qur'ān which states: "so judge between them by what God has revealed" is an entirely general prescription which contains no qualification whatsoever concerning the consent of both parties to bring the suit. Moreover, the nature of justice requires that the complainant brings his claim before the judiciary and, if proved, a decision will be rendered in his favour. The enforceability of the decision is on no account dependent on the acquiescence of the defendant.

ii. As mentioned earlier, the protection of non-Muslims and the guarantee of their property and rights is a duty incumbent upon the Muslim state. This duty cannot be effectively carried out in the absence of judicial protection afforded through the courts of law. In turn, this protection cannot materialize if its enforcement is made dependent on the consent of the defendant as this would seriously undermine the rights of the injured party, a result which would be clearly contradictory to the precepts of Islamic law which prohibits injustice and orders redress of wrongs.

2. Competence on Fiscal Matters

The Muslim authorities have shown considerable tolerance by throwing open the doors of the Muslim states to non-Muslims for trade purposes. Non-Muslim merchants were as a rule granted aman

(or safe conduct) for four months, subject to renewal if their business transactions were not completed during the interim.⁹⁹ In Islam, however, there is a close connection between taxation and government. The taxation regime reflects in theory the circumstances of the state in its relation with outside trade. Detailed rules were laid down for the rate of taxation to be applied to foreign trade. Foreign merchants were required to pay a duty of 10% on all the goods they imported into a Muslim state and this explains why the regime of taxation of foreign trade is known as 'Ushur.¹⁰⁰

The right of collecting tax is based on the idea that foreign traders during their sojourn in Muslim territory enjoy the protection of the Muslim state and so come under its taxing power. This toll is payable once for any goods imported into the Islamic territory and is not repeated if foreign merchants travel from one district to another within the Muslim territory, for with respect to foreign merchants, all Muslim districts are like one single district.¹⁰¹ However, the toll may be repeated if the merchants have meanwhile returned to their own country and decided to re-enter the Muslim state, for upon their return the effect of the aman which was originally given to them will expire.¹⁰²

In levying this tax, Islamic jurisprudence recognizes the doctrine of reciprocity. Foreign merchants entering the Muslim territory for trade would be treated in an equal manner as Muslim merchants would be in foreign states. The jurists relied on the practice of 'Umar, the second caliph. When 'Umar was asked, "How much shall we collect from the harbis [foreign non-Muslim traders]", he said: "How much do the harbis collect from us?" When he was told that they collected 10 per cent, he said: "Collect from them 10 per cent".¹⁰³ It was related by al-Sarakhsi that 'Umar said: "Collect from them the rate they collect from us" and when further

asked "If it is not known what rate they collect?" he answered: "Collect from them ten per cent".¹⁰⁴

Foreign merchants are never taxed when they have little property, because they will need it for food and other essential needs, and since they have so little property, it needs no protection from robbers.¹⁰⁵ Some jurists added that taxation of such little property would be contrary to the essence of amān (or safe conduct) originally envisaged.¹⁰⁶

If the principle of reciprocity is to be adopted, then it must be interpreted as follows:

- 1) The actual rate of taxation should be calculated on the basis of this reciprocity. If Muslim merchants in a foreign state are subject to, for instance, 10 per cent, then foreign merchants will be subject to an equal percentage and, if a heavy tax is collected from Muslim merchants abroad, then the head of the state is advised to reciprocate by enforcing a similar tax.¹⁰⁷
- 2) If certain categories of items and merchandise of Muslim merchants benefit in a foreign state from exemption of taxation, the same should apply to goods and merchandise imported into the Muslim state by foreign traders.¹⁰⁸
- 3) The children and women of foreign merchants are exempt from tax on condition that similar treatment is accorded to Muslims by their states.¹⁰⁹

3. Jurisdiction Over Visiting Armed Forces

Armed forces belonging to a foreign power enjoy complete immunity from the jurisdiction of the Muslim state provided that they had entered the Muslim territory with the consent of the local authorities. The status of such forces was stated by al-Sarakhsi in the following words:

If an army of a foreign power entered Muslim territory and a Muslim should go to them by permission and contract with them for some transaction, his case would be on the same footing as if he entered their territory, for a military camp possesses a resisting power. And Islamic jurisdiction does not extend to their camp just as in their territory Don't you see that if a Muslim army had entered a foreign territory and the transaction has taken place there, it would have been treated as if it had taken place in the Muslim territory. 113

Thus, visiting armed forces are regarded as autonomous units subject to the jurisdiction of the respective power. However, contemporary Muslim writers have adopted the view that all immunities that did result from the presence of foreign armed forces were definitely exceptional and not to be lightly implied.¹¹⁴ Various practices have been quoted to support that view. For example, it was reported that certain soldiers who belonged to foreign armed forces during the Abbasid period were ordered to pay the price of goods they had bought from Muslim markets.

We may conclude this preliminary examination with the following observations:

- 1) The principle according to the views of the majority of Muslim jurists is that Muslim judges have jurisdiction over non-Muslim cases, for Islam must dominate and not be dominated. The principle is laid down in the Qur'ān in the following verse: "So judge between them by what God hath revealed".
- 2) In the field of foreign trade the fiscal competence of the Muslim state to impose taxes and customs is fairly established in the Islamic jurisprudence, although that competence may sometimes be relinquished on reciprocity considerations.
- 3) Exemption from territorial jurisdiction is recognized by cases in which foreign armed forces are involved, although that exemption is implicitly limited in operation.

References - Chapter Six

1. H.C. Gutteridge, "Comparative Law and the Law of Nations" in W.E. Butler (ed.), International Law in Comparative Perspective (The Hague: Sijthoff and Noordhoff, 1980), p.13.
2. To mention but some examples on the question of admissability of private law rules: H. Lauterpacht, Private Law Sources and Analogies of International Law (London: Longmans, Green & Co. Ltd., 1927); The Function of Law in the International Community (Oxford: Clarendon Press, 1933). See also T. Gihl, International Legislation (London, 1937).
3. See L. Oppenheim, International Law, Lauterpacht (ed.), Peace, Vol. 1 (London, 1955), 8th ed., Chap. 1, Part VI; see also pp.43-7.
4. PCIJ, Series A, No. 10, 1927.
5. ICJ Reports 1951.
6. ICJ Reports 1969, p.3.
7. For instance, in the Corfu Channel case (Merits), ICJ Reports 1949, Case No. 1/B, p.18, the court briefly stated that: "this indirect evidence is admitted in all systems of law" without any further elaboration. See also the individual opinion of Judge Hudson in the Diversion of Waters from the Meuse case, PCIJ, 1937, Series C, No. 81, p.77: the principle according to which a party who does not perform his contractual obligations cannot take advantage of similar non-performance of that obligation by the other party is examined by reference to the equitable doctrine of "clean hands".
8. See Bernard Dutoit, "Comparative Law and Public International Law" in W.E. Butler (ed.), op. cit., p.73.
9. See ICJ Statute Article 38(1)(c).
10. See L.C. Green, "Comparative Law as a 'Source' of International Law" in W.E. Butler, op. cit., p.141.
11. H.C. Gutteridge, "Comparative Law and the Law of Nations", in ibid., p.14.
12. Ibid.
13. Syed Sharifuddin Prizada, "Islam and International Law" in Altaf Gahar (ed.), The Challenge of Islam (London: Islamic Council of Europe, 1978), p.197.
14. Oppenheim and Lauterpacht, op. cit., p.48, called it: "essentially a product of Christian civilization". See also D. Greig, International Law (London: Butterworth, 1976), 2nd

- ed., p.2. However, there were others, e.g. T.A. Walker, History of the Law of Nations (Cambridge, 1899), Vol. I, who recognized the influence of Islam on modern international law.
15. See, e.g., C.H. Alexandrowicz, Introduction to the History of the Law of Nations in the East Indies (Oxford: Clarendon Press, 1967); "Mogul Sovereignty and the Law of Nations", IYBIL, 4 (1955), 316; "Treaty and Diplomatic Relations between European and South Asian Powers in the 17th and 18th Centuries", RDC, 100 (1960-ii), 207. Muslim scholars have also claimed that modern international law has inter alia been influenced by, and is the result of, centuries of interaction between European 'Christian' states and the 'Islamic' state. See, e.g., M. Hamiddullah, Muslim Conduct of State (Lahore: S.H. Mohammed Ashraf, 1968), Rev. 5th ed., pp.63-9. This claim has been labelled by others as a gross exaggeration; see R. Peters, Islam and Colonialism (The Hague: Mouton Publishers, 1979), p.139.
 16. As far as Islam and the Law of Nations is concerned, see Majid Khadduri, War and Peace in the Law of Islam (New York: Ams Press, 1955); The Islamic Law of Nations (Baltimore, 1966); Law in the Middle East, Khadduri and Liebesny, eds. (Washington, DC, 1955), Chap. XV, and Mohammed Hamidullah, The Muslim Conduct of State, op. cit.
 17. See C. Wilfred Jenks, Sovereignty within the Law (London: Stevens and Sons Ltd., 1965), p.3.
 18. See C.W. Jenks, The Common Law of Mankind (London, 1958), p.87.
 19. Sohn, UPLR, 108 (1959), 172.
 20. Jenks, op. cit., p.12.
 21. Art. 38(1)(c) substantially reproduced Art. 38(3) of the Statute of the ICJ. An examination of the minutes of the Committee of Jurists, which drafted the Statute of the PCIJ, seems to show that para. 3 was inserted for two reasons: a) to prevent the court from declaring a non liquet on the ground of an alleged absence of law applicable to a case before it, and b) to avoid the danger in such cases of the judges deciding according to their personal views. See Permanent Court of International Justice, Proceedings of the Advisory Committee of Jurists, 16 June-24 July 1920 (The Hague, 1920), pp.293-338.
 22. According to Schwarzenberger, the test as to whether a nation was civilized was whether its government was sufficiently stable to undertake a binding commitment and whether it was able and willing to protect adequately the life, liberty and property of foreigners. See George Schwarzenberger, "The Standard of Civilization in International Law", CLP, 8 (1955), 211-34, at 227. Since the two world wars, there has been

general agreement that the test of civilization no longer corresponds with the concept "advanced, industrial, commercial nations". The old concept was abandoned and clearly has been replaced by the multiple concept of the "main forms of civilization". See B.V.A. Roling, International Law in an Expanded World (Amsterdam: Djambatan, 1960), p.44. Art. 4 of the Charter of the UN no longer speaks of "civilized nations". The concept is now being replaced by the phrase, "peace-loving nations".

23. See Sir H. Waldock, "General Course of Public International Law" RDC, 106 (1962-ii), 54.
24. Lord Macmillan, Law and Other Things, (Cambridge: University Press, 1938), p.114.
25. See Gutteridge, op. cit., p.22.
26. H. Lauterpacht, Private Law Sources, op. cit., p.178.
27. The English translation of the Qur'an verses in this part has been taken from: Abdullah Yusuf Ali, The Holy Qur'an, Text, Translation and Commentary (Lahore: Shaikh Mohammed Ashraf, 1938).
28. S. Ramadan, Islamic Law: Its Scope and Equity (London: P.R. Macmillan, 1961), pp.31-3; see also Sobhi al-Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", RDC, 117 (1966-i), 229; Noel J. Coulson, Conflict and Tensions in Islamic Jurisprudence (Chicago: The University Press, 1969), p.80.
29. See H. Kelsen, The General Theory of Law, Andres Wedburg trans. (Cambridge: Harvard University Press, 1949), p.9.
30. See N.J. Coulson, A History of Islamic Law, (Edinburgh: University Press, 1964), p.11.
31. Q, VII: 157.
32. It was permitted by the Prophet in the well-known tradition when he sent Muadh Ibn Jabal as Governor of Yemen. The Prophet asked him how he would adjudicate cases; "By the Book of God", he replied. "But if you can find nothing in the Book of God, how?" "Then by the precedents of the Prophet". "But if there is no precedent?" "Then I will diligently try to form my own judgement". On this the Prophet is reported to have said, "Praise be to God who hath fulfilled in the messenger sent forth by his Apostle that which is well pleasing to the Apostle of Allah". Reported in Sahih al-Tirmidhi, vol. 6, 68-9.
33. A Muslim is told by law not only what is required (fard: the doing is rewarded the omission punished), but also what is recommended (mandub: the doing of being rewarded), disapproved

- (makruh: but without penalty), or permitted (Ja'iz: on which the law takes a neutral stance). See M. Khadduri, "Nature and Sources of Islamic Law", Geo.W.L. Rev., 22 (1953), 3, 8.
34. See Gamal Moursi Badr, "Islamic Law: Its Relation to Other Legal Systems", AJCL, 26 (1978), 189-90.
 35. The point was made clear by modern writers on the subject. See, e.g., Mohammed Hamuddullah, The Muslim Conduct of State, op. cit.; M. Khadduri, War and Peace in the Law of Islam; The Islamic Law of Nations, op. cit.
 36. On this point, see A. Hassan, The Early Development of Islamic Jurisprudence (Islamabad: Dar al-Kutub, 1970), pp.119-21; H. Moinuddin, The Charter of the Islamic Conference and Legal Framework of Economic Co-operation among its Member States (Oxford: Clarendon Press, 1987), pp.15-16.
 37. See Joseph Schact, "The School of Law and Later Development of Jurisprudence", in M. Khadduri and H. Liebsny (eds.), Law in the Middle East (Washington: The Middle East Institute, 1955), p.66.
 38. Q, XXII: 78.
 39. See Ibn Qudama, al-Mughnī (Cairo, 1928), Vol. 8, p.523.
 40. Q, IX: 7.
 41. See M. Khadduri, War and Peace in the Law of Islam, op. cit., pp.202-22.
 42. See Ibn Tayummyya, al-Fatawa, Vol. III, pp.329, et seq.
 43. See al-Jasas, Akam al-Qur'ān (Cairo: al-Matba'a al-Missriyya, 1374 A.H.), Vol. II, p.295. The doctrine will be more fully discussed later in this part.
 44. G.M. Badr, "A Historical View of Islamic International Law", Rev.Egy.Dr.Int., 38 (1982), 1.
 45. See Khadduri, War and Peace, op. cit., pp.47-8.
 46. See Moinuddin, op. cit., p.17.
 47. To some scholars these works possess evident defects as a 'source', no matter how subsidiary. See P.C. Jessup, Transnational Law (New Haven: Yale University Press, 1956), p.11; Clive Parry, The Sources and Evidence of International Law (Manchester: University Press, 1965), pp.103-5.
 48. See Khadduri, War and Peace, op. cit., p.48; Moinuddin, op. cit., p.17.

49. English translation by R. Knolles in 1606, ed. McRea (Cambridge, Mass.: Harvard University Press, 1962).
50. Ibid., p.84.
51. See, e.g., W.W. Willoughby, The Fundamental Concept of Public Law (New York: The Macmillan Co., 1924, p.71; J.W. Garner, Political Science and Government (Calcutta: American Book Co., 1958); and H.J. Laski, The Problem of Sovereignty (London: George Allen & Unwin, 1917).
52. The monarch promulgates law, is a judicial authority, can appoint judges and has the power to make war and peace. See Q. Skinner, The Foundation of Modern Political Thought (Cambridge: University Press, 1978), Vol. 2, p.289.
53. "For him [Bodin] sovereignty and the power to make law were all but synonymous". See W.F. Church, Constitutional Thought in Sixteenth Century France (Cambridge, Mass.: Harvard University Press, 1941), p.229.
54. See H. Kelsen, op. cit., p.13.
55. Q, XX: 123.
56. See Abu al-'Ala al-Maududi, The Islamic Law and Constitution (Lahore: Islamic Publications Ltd., 1980), 7th ed., pp.215-9; H.K. Sherwani, "Sovereignty in the Islamic State:", Isl.Lit. (1950), 21.
57. Q, III: 26. See also ibid., V: 43; VII :10.
58. This idea has been adopted by the objectives of the Resolutions of the Constitution of Pakistan; see Pakistan Fundamental of Freedoms, in Constitution of Pakistan passed by the Constituent Assembly on 12 March 1949 (Karachi: The Government Press, 1949), p.1.
59. See I.H. Qureshi, "Sovereignty in an Islamic State", in Sharif al-Mujahid (ed.), Ideological Orientation of Pakistan (Karachi: National Book Foundation, 1976), pp.111-2.
60. For an English translation of the text, see Sir William Muir, The Caliphate (Edinburgh: John Grant, 1915), pp.4-5.
61. On the authority of Muslim, Vol. IV, Bk. VII, 58.
62. Ibn Qutaiba, 'Uyun al-Khbār, ed. Brockleman (Berlin and Strasburg, 1931-33), Vol. I, p.11; see also, Hamiddullah, al-Wathay'iq, op. cit., p.356.
63. Majid Khadduri, War and Peace in the Law of Islam, pp.14-18.
64. See M.R. Ridda, The Islamic Political Thought (Cairo: Dar al-Ansar, 1980), p.78.

65. See T. Hobbes, Leviathan (Harmondsworth: Penguin Books, 1968), p.220.
66. J. Austin, Lectures on Jurisprudence (London: John Murray, 1880), Part I, p.95n.
67. H.A.R. Gibb, "Constitutional Organizations", in Law in the Middle East, op. cit., p.3.
68. The classical conception of international relations in Islam has been subjected to detailed treatment. See, e.g., M. Hamiddullah, The Muslim Conduct of State, op. cit.; "The International Law in Islam", Isl.Rev., 39 (1951), 8; "The Place of Islam in the History of Modern International Law", Hyderabad Acad. Stu., 2 (1940), 29-34; Kruse, "The Islamic Doctrine of International Treaties", ICLQ, I (1954), 152-8; Khadduri, War and Peace in the Law of Islam, op. cit.; The Islamic Theory of International Relations and its Contemporary Relevance in J.H. Proctor (ed.), Islaman and International Relations (London, 1965); S. Akhtar, "An Enquiry into the Nature, Origin and Sources of Islamic Law of Nations", Isl.Stu., 10 (1971), 23-37; R. Peters, op. cit.
69. See Khadduri, The Islamic Theory of International Relations, op. cit., p.28.
70. See al-Ghunaimi, The Muslim Conception of International Law and the Western Approach (The Hague, 1968), p.136.
71. Q, LX: 8.
72. Q, LX: 9.
73. Ibid.
74. For the most authoritative definition, see al-Sarakhsi, Sharh al-Siyyar al-Kabīr (Hyderabad: Matba'at al-Ma'arif al-Nizamiyya, 1335 A.H.), 1st ed., Vol. III, p.81; Abdul Wahab Khallaf, al-Siyya al-Shar'aiya (Cairo: al-Matba'a al-Salafiyya, 1350 A.H.), p.69.
75. See Khallaf, op. cit., pp.35-6.
76. On this category, see al-Mawardi, op. cit., pp.35-6.
77. Treaty of Amity and Commerce: The Ottoman Empire and France, February 1535. Renewed and expanded 18 October 1569, July 1581, February 1597, June 1673 and in perpetuity 28 May 1740; terminated 6 August 1924. For the text of the treaty, see U.S. 67th Cong., 1st session, Senate, Doc. 34, pp.94-6.

78. Khadduri, The Islamic Theory of International Relations, op. cit., pp.33-5.
79. Art. 2 of the Arab League Pact.
80. See C. Thomas, New States, Sovereignty and Intervention (London: Gower, 1985), p.81.
81. The text of the Charter may be found in UNTS, 914, No. 13039, 103; CON.4/3/72, EIF 28/2/73. The Charter came into force on 28 February 1973. As of January 1986, the OIC comprises 45 members: Afghanistan, Algeria, Bahrain, Bangladesh, Benin, Brunei, Cameroon, Chad, Comoros, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Mali, Mauritania, Morocco, Niger, Oman, Pakistan, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Syria, Tunisia, Turkey, Uganda, UAE, Upper Volta, Yemen Arab Republic, People's Democratic Republic of Yemen. On 9 November 1981, the UN General Assembly adopted Res. 36/23 on cooperation between the UN and OIC which represented the 45 Islamic states. This was adopted without vote, and drafted by Iraq (A/36/L.8), agenda item 25, YBUN, 35 (1981), 356.
82. See Brownlie, op. cit., p.43.
83. See Khadduri, War and Peace, op. cit., p.191.
84. Muslim jurists often advised Muslim heads of states that they should protect musta'mins while they were within Muslim territory and ensure that justice was done to them. See Sharh al-Siyar al-Kabīr, op. cit., Vol. IV, pp.109-9. Some other jurists went even further by saying that: "A musta'min cannot be exchanged for a Muslim prisoner of war, even if such an exchange was demanded by his own country except with his consent. He remains under the Muslim protection and can on no account be extradited because extradition would violate the aman (safe conduct) conferred upon him by the state"; ibid., Vol. III, p.300.
85. See al-Mirghinānī, al-Hidayya (Bulaq: al-Matba'a al-'Amiriyya al-Kubra, 1315-1318 A.H.), Vol. VI, p.300; al-Kasanī, Bada'i al Sana'i, Vol. VII, p.107.
86. See Moinuddin, op. cit., p.57.
87. PLD (1969), 1050.
88. Ibid., 1062-4. The case has been skilfully analyzed by Moinuddin, op. cit., pp.59-60.
89. On Muslim Private International Law, see Choucri Gardahi, "Conflict of Law" in Law in the Middle East, op. cit., Chap. XIV, p.334.

90. See Herbert J. Liebesny, The Development of Western Judicial Privileges, *op. cit.* p.327.
91. al-'Umm, II, 293; Mughnī al-Muhtāj, III, 195.
92. Q, V: 45.
93. al-Mughnī, VIII, 535; al-Imam Malik, al-Mudawana al-Kubra (Cairo: Matba'at al Sa'ada, 1333 A.H.), Vol. IV, p.161.
94. Q, V: 51.
95. See Mohammad Bakhit al-Mutu'i, Irashad al-'Umma ila Ahkām al Hukm Bāyn ahl al-Dhimma (Cairo: al-Matba'at al'Adabiyya, 1317 A.H.), pp.12-14.
96. Tafsir ibn Kathir (Cairo: Matba'at Mustafa Mohammad, 1356 A.H./1937 A.D.), Vol. II, p.60.
97. Q, V: 47.
98. See al-Jasas, Ahkām al-Qur'ān (Istanbul: Matba'at al-Awqaf al-Islamiyya ti Dar al-Khalaf al'Aliyya, 1335 A.H.), Vol. II, p.435.
99. al-Tabari, Kitāb al-Jihād, ed. J. Schacht (Leiden, 1933), p.36.
100. Arabic word for 10 per cent tithe.
101. al-Kasanī, Vol. II, p.37; Fath al-Qadir, Vol. I, p.534.
102. Sharh al-Siyar al Kabīr, Vol. IV, p.287; al-Kasani, Vol. II, p.37.
103. al-Mabsūt, Vol. II, pp.199-200; Sharh al-Siyar al-Kabir, Vol. IV, p.283.
104. al-Mabsūt, Vol. II, pp.199-200; al-Kasani, Vol. II, p.39. The Maliki jurists approved the levy of ten per cent on foreign non-Muslim traders, and based their view on the above-mentioned practice of 'Umar. See, Sharh al-Zarqanī 'ala Mutta' al'Imam Malik (Cairo: Matba'at Mustafa Mohammad, 1355 A.H./1936 A.D.), Vol. II, p.143.
105. al-Mabsūt, Vol. II, p.200.
106. Ibn 'Abdīn, Rad al Muhtār 'ala al-Dur al-Mukhtār Sharh Tanwīr al'Absār (Cairo: al-Matba'at al'Uthmaniyya, 1324 A.H.), Vol. II, p.56.
107. Sharh al-Siyar al-Kabīr, Vol. IV, p.283.
108. Ibid., p.286.

109. Rad al-Muhtār, Vol. II, p.56.
110. Sharh al-Siyar al-Kabīr, Vol. IV, p.286.
111. al-Mirghinānī, al-Hidaiya (Bulaq: al-Matba'at al'Amiriyya al-Kubra, 1315-1318 A.H.), Vol. I, pp.534-5.
112. See Abu al'Ubayd, Kitāb al-Amwāl (Cairo: al-Matba'at al'Amiriyya, 1353 A.H.), p.533.
113. Sharh al-Siyar al-Kabīr, Vol. IV, p.132.
114. See A. Khatab, al-'Askariyya fi-al-Islām (Beirut: Dar al-Ma'arifa, 1978), p.34.

CHAPTER SEVEN

THE ISLAMIC APPROACH TO SOVEREIGN IMMUNITY AND ITS RATIONAL BASIS

I. THE THEORY

The Islamic approach to sovereign immunity generally rests on the idea of the rule of law. The rational basis of this approach could be based on different considerations.

1. The Principle of Territorial Sovereignty

The first cardinal principle upon which the Islamic concept on sovereign immunity is based is that of territorial sovereignty and jurisdiction. Islamic jurisdiction, as mentioned earlier, is exercisable, with minor exceptions, over all persons and subjects within the Muslim state. In addition, the idea of personal law has no place in Islam. Islamic law is territorial in the fullest sense of the word and is thus applicable to all events occurring within the borders of the Muslim state. However, several writers, in discussing the extent to which Islamic law applies in disputes involving foreigners, assert that Islamic law is not applicable in its entirety to non-Muslims.¹ They believe that the law to true believers is something eminently personal. To them it springs from the individual and is associated only with him. They maintain that, since Muslim law is religious, it can be applied only to Muslims, while non-Muslims (subjects or foreigners) are bound by no law but their own. These views appear to be based on a misconception of the real nature and character of Islamic law and sovereignty. Islamic law is a religious law only in the sense that it has basic ethical grounds and some of its general principles are to be found in the Qur'an and in the pronouncements of the Prophet. Beyond that, the corpus of the Islamic law as it developed over the ages is

man-made in the sense that it has resulted from the efforts of jurists of the various schools of law.

The idea that non-Muslims are exempt from Islamic state jurisdiction in all matters has sometimes been carried to its extreme. It has not infrequently been maintained that non-Muslims resident within the Islamic state are free to judge their own controversies, to set up their own standard of conduct and to establish their own judicial institutions within the Muslim state. This alleged freedom without regard to the rights and interests of the whole body of the state is a 'malignant and sinister' legacy from the colonial era and should be discarded as anarchy. Furthermore, these ideas cannot be attributed to the Islamic jurisprudence. As explained, there is unanimous agreement, even among classical Muslim scholars, that Islamic law applies to all and that the Islamic state has full power and control over all persons and things within its territory. Equality before courts of law is a cardinal principle of justice in Islamic jurisprudence. With respect to non-Muslims, a modern Islamic scholar writes: "They shall enjoy what we do enjoy and shall be responsible for carrying out the same obligations as we do".²

The view that Islamic law is personal, constitutes in the last analysis the fundamental grounds which underlie the capitulations in Western writings. It is maintained that Muslim law is inapplicable to non-Muslims, and as such, Christians and other non-Muslim powers and their nationals were declared immune under the pretext of the capitulations from local jurisdiction. If this was so, and it certainly is not, there would be no question of subjecting these foreign powers to the territorial jurisdiction of the host countries with which the capitulation treaties had been concluded. Indeed, the idea has been employed for a much more far-reaching purpose. It has often been maintained that the regime of capitulations, as applied to the countries of the East, was connected with the inferiority of civilization and retarded their admission to the family of nations. It has also been maintained that the purpose of these capitulations was the protection of Europeans in the East

since the East lacked the legal institutions to protect foreigners in conformity with the requirements of civilization. This major misunderstanding was correctly dispelled by Alexandrowicz in a valuable research when he commented that:

Europeans coming to the East would not have been able to establish their settlement and engage in trade without the existence of ancient legal custom which permitted the admission of foreigners and safeguarded their activities as merchants. 3

In the case of the Ottoman capitulations, these treaties were concluded to provide a temporary solution for jurisdictional issues. This was regarded as necessary as more and more Europeans began to settle in the Ottoman Empire, and in most cases it was effected through concurrent jurisdiction, as in the case of Egypt, where the concept of mixed jurisdiction was employed. Again, most of the treaties were motivated by political and commercial considerations and were clearly not based on any precepts of Islam. In short, the whole history of extra-territoriality in the Ottoman Empire can be divided into two stages.

In the first stage, the old capitulation treaties between the Porte and the European powers, which formed the basis of the so-called legal rights of foreigners in some Muslim countries and were concluded between 1835 and the middle of the 19th century, were accorded to foreigners in a simple form out of grace. Most of them were motivated by the principle of religious tolerance and, moreover, these privileges were regarded as of little importance because at that time the Ottoman Empire was strong and quite capable of looking after herself.

In the second stage, when Turkish power declined, this was accompanied by an increase in the number of Europeans resident in her dominions. Gradually they were taken out of the local jurisdiction and, as a result, they enjoyed extensive exemptions from the poll-tax payable by the non-Muslim subjects of the Empire. These exemptions were extended until foreigners were paying less in taxation than the citizens in general. All this was justified on the idea of personality of the law and the principle of religious

tolerance.⁴ It is true that tolerance is inherent in Muslim law, as was explained earlier. However, that tolerance later shifted from the purely jurisdictional sphere to the political sphere. This tolerance, which was originally recognized in acts of worship and personal status, was later extended, under the device of the capitulations, to include almost the entire judicial and administrative systems as well as customs of the Ottoman Empire, Egypt, Morocco, etc. It was under these circumstances that the idea of personal sovereignty emerged.

Later the Ottomans themselves became conscious of the limitations on their sovereignty as a result of the capitulations and, in the second half of the 19th century, started to promulgate laws reducing the jurisdiction of the communal courts and limiting that jurisdiction to matters of religious practices and personal law cases.⁵ In short, it can be said that sovereignty within the Muslim state is territorial in the sense that it extends its authority over all persons (Muslims and non-Muslims, subjects or foreigners), things and lands. If the principle of full sovereignty of the Muslim state over its own territory is accepted, then it follows that this sovereign authority is supreme and uncontested within the Muslim state's own territorial confines and that another entity, whether private or sovereign, carrying out an activity or performing an act therein is subject to the law of the land, which recognizes no exception in favour of foreign individuals or foreign sovereigns.

2. The Analogy with the Local Ruler of the Muslim State

As mentioned in Part I, one of the rational explanations of state immunity in modern international law is based on the historical development of analogy with immunities of local sovereigns. This is peculiar to common law countries. In English law, the Crown could not be sued in local courts by any injured party. The law presumed that the King could do no wrong, and

therefore if the King commanded an unlawful act to be done, the wrong of the instrument is not thereby indemnified.⁶ This prerogative was removed by the Crown Proceedings Act 1947.⁷ As mentioned earlier, the immunity of the Crown was extended by the English courts to cover the case of foreign sovereigns with whom foreign states have subsequently been identified. Accordingly, the concept of foreign state immunity from jurisdiction derived in part from the fact that some states were immune from the jurisdiction of their own courts.

The Islamic approach to the problem of state immunity is radically different. It cannot be denied that a head of state occupies a unique position within the Muslim state. Yet, unlike the common law concept, Islamic law does not recognize this extreme immunity. The power of the head of state in Islam is restricted. He enjoys no prerogatives and is obliged to submit to the Shari'a. This limitation arises from the special character of Islamic law, being primarily of divine origin. It makes no distinction between the law governing the rulers and that governing the ruled. The law being thus of sacred origin demands the obedience even of the head of state himself, and the administration of the state is envisaged to be brought into harmony with the dictates of this law.

The Islamic theory in this regard may be formulated as follows: the relations arising from the acts of the head of the state, even in his capacity as a ruler and a holder of sovereign powers, are not exempt from the operation of the Shari'a. Equally, if he does a thing in his private capacity, he is liable to be tried before an ordinary Muslim court, just as any other individual. The theory is partly based on the concept of 'Adl'. 'Adl' (justice) is the goal and purpose of the Shari'a, which guarantees justice for everyone. Indeed, there are many verses in the Qur'ān which speak about justice: "God commands justice, the doing of good and liberty to kith and kin and he forbids all shameful deeds, and injustice and rebellion".⁸ Another verse reads:

O ye who believe stand out firmly for God, as witnesses to fair dealing, and let not the hatred of others to you make you

swerve to wrong and depart from justice. Be just, that is next to piety; and fear God. 9

The Prophet himself heard cases against his proper person and did full justice to the complainants. It was reported that once the Prophet unintentionally injured the skin of a Bedouin, who claimed retaliation. Then the Angel Gabriel came to him and said: "O Mohammad! Lo! God hath not sent thee as either a tyrant or an arrogant. Whereupon the Prophet called upon the Bedouin and said: take retaliation from me".¹⁰

Mohammad himself was always strict and fair in his dealings.¹¹ He disregarded distinction and discouraged undue reverence. He used to join with his companions in their manual labour and said: "I am only a man like unto you".¹²

No less difficult than keeping a promise is the doing of justice in cases where one of the parties concerned happens to belong to a distinguished dignitary or social rank. A woman belonging to the tribe of Makhzum was found guilty of theft, and her relations requested Usama ibn Zaid, for whom the Prophet had much regard, to intervene and entreat the Prophet to release her. The Prophet said: "O Usama, do you mean to come to me and intercede against the laws of God?" He convened a meeting and thus addressed them:

Nations which have preceded you have been wiped off the face of the earth, for the one reason only, that they imposed punishment on the poor and relaxed the laws in favour of the rich. I swear by God that if Fatima, my daughter, were to be found guilty of theft, then I would have her hands cut off. 13

Any number of instances could be quoted,¹⁴ but what has been said is sufficient to show that the Prophet himself did not claim any special prerogatives or privileges from the operation of the law. He looked upon all alike. Rich or poor, high or low, master or servant, all he treated in the same way without any regard to dignity or rank. Thus he exemplified and worked out all the principles revealed to him in the Qur'ān regarding doing justice, keeping of a promise, fairness in dealing and disregard of distinction. In the closing days of his life, he thus addressed a

public gathering:

People! You may have had claims against me. If I have whipped anybody's back, let him retaliate on this my back. If I have condemned or censured anybody's honour, here is my honour to take revenge upon. If I have taken anybody's property, here is my property; let him take it In fact dearest to me is the one who takes his claim from me if he has right thereto, or forgives me. Thus I shall meet my Lord with a clear conscience.

A man rose and claimed that the Prophet had borrowed some money from him. This was at once paid to him.¹⁵

The Prophet's successors followed in his footsteps consistently, e.g., no less than the second caliph, 'Umar, and the fourth caliph, 'Ali, accepted to abide by their agreements and to appear before the courts as ordinary litigants without feeling that their conduct was against their sovereign dignity.¹⁶ It was also reported by al-Kindi,¹⁷ that the Abbasid Caliph al-Mansur (754-775) was sued by a woman before a Muslim judge. It was said that the majesty of the Khilāfa did not prevent him from humbling himself before the law.

Consequently, a Muslim head of state, when he chooses to engage in a personal or business transaction with private persons, enjoys no immunity from the operation of the law, thus placing himself, by this very act, on an equal footing with his commercial partner. Equality before the law is the basic principle of Islamic law and the ruler thus personally involved has no special prerogative or immunity from the jurisdiction of the courts. As a modern Western scholar observed:

Many texts can find nothing better to say, in praise of a caliph, than to show him appearing with his opponent, on an equal footing, before the qadi and submitting to the decision he gives. Authentic or not, such stories reveal, at any rate, the point of view of the doctrine. 18

Some Muslim scholars have carried this non-immunity to its extreme. For instance, Ibn Qudama, an authoritative jurist of the Hanbali school, maintained that the principle which required the ruler to submit to the jurisdiction of the courts of law, even

applies to the ruler acting in a public capacity, just as much as to any private individual acting in a private capacity. He unequivocally states that:

Our legal scholars have said that a breach of faith on the part of an Imam is more serious and heinous than a breach of faith by anyone else, because of its evil consequences. For if the Imam break faith and get a name for doing so the enemy will not trust them in a covenant or truce and this will cause the Muslim leaders to be discredited. 19

Again, just as the ruler enjoys no immunities from the substantive law, one would not expect him to enjoy any regarding jurisdiction. It was an established principle of Islamic jurisprudence that party and judge cannot be one and the same person, not even the caliph.²⁰ Hence, whenever the ruler had any suit to file, or one was filed against him in his private capacity, the judge of the local court had exclusive jurisdiction.

The view that the head of state in Islam is subject to the law even in relation to his public acts is rightly said to be based on the requirement that any discretionary powers exercised by the ruler for the purpose of safeguarding the interests of the state must strictly be done within the confines of the Shari'a.²¹ Hence, if the local sovereign in Islam does not enjoy exemption from the jurisdiction in their own courts, one should not expect such privileges to be extended to foreign sovereigns.

3. The Limited Nature of Sovereignty

Another explanation for finding a workable hypothesis on which to base the Islamic approach to state immunity is the idea of limitation of sovereignty in the Islamic legal system. The idea is derived from the basic principle that there is nothing approaching absolute sovereignty in the Islamic legal system. If by sovereignty one understands the power and authority of the territorial states, these are always subject to and limited by law. As has been mentioned, there is no privilege nor prerogative reserved for the state. Whenever the state violates the law, it is accountable for

its wrongdoing and cannot be allowed to raise any prerogatives in the context of a claim made against it by a private individual.

Thus, in Islamic theory, sovereignty fulfils only specific functions in the organization of society and should have its power limited to the exercise of these functions within the framework of the law. If the doctrine of vicarious liability can be used in this regard, the sovereign authority will equally be responsible for any act of its officials and organs which results in an injury to a private individual. If sovereignty in Islam is not absolute, one should not expect the immunities, if any, enjoyed by such sovereignty to be absolute in its relations with other sovereignties or with private individuals. It appears, according to this approach, that the question as to whether one state must submit to the jurisdiction of another or whether the second state must grant the first immunity, is essentially a practical problem associated with the nature of sovereignty: a sovereignty which is prepared to submit to its own internal legal order is not prepared to grant a foreign sovereignty what it denies to itself.

4. The Principle of Sanctity of Contract

Another rational explanation of the Islamic approach to state immunity is founded on the basic norm of the principle of the binding nature of contractual obligations. This principle is corroborated by the various sources of Islamic law. In the first and primary source of law, a number of verses can be found to support the rule, e.g. "O ye who believe fulfil [all] obligations".²² This verse is interpreted to apply to all contracts and agreements. A leading commentator on the Qur'ān, for example, categorically states that: "This is a command from God that every lawful contract must be observed; and it is not permissible to limit its application without proof of such limitation".²³ Another verse says: "... and fulfil [every] engagement for [every] engagement will be inquired into [on the Day of Reckoning]".²⁴ Here again the commentator gives a general

meaning and the command 'fulfil' is interpreted to be of general application.²⁵ The fulfilling of an engagement is described by the Qur'ān as an indication of good faith and piety: "successful indeed are the believers those who faithfully observe their covenants".²⁶ Elsewhere in the Qur'ān it is said: "Fulfil the Covenant of God which ye have entered into, and break not your oath after ye have confirmed them. Indeed you have made God your surety. For God knoweth all that ye do".²⁷ Again commentators on the Qur'ān, like al-Qurtubi, state emphatically that the words "fulfil the covenant of God" is a general term applicable to all covenants which are made by the word of mouth and which man takes upon himself".²⁸

The traditions of the Prophet, the second source of Islamic law, clearly reiterate the principle of the sanctity of contracts. The Prophet is reported to have stated: "Muslims are bound by their stipulations".²⁹ Similarly, another tradition affirms:

For everyone who commits a breach of faith, there will be set up, on the day of judgement, a flag proportionate in height to his breach in faith, but there is no one who breaks faith more guilty than he who commands the common people. 30

If we turn to the work of leading Muslim jurists, we find abundant authority for the proposition that contracts and engagements are legally binding. In particular, the learned jurist, Ibn Tayimiya, elaborated this principle in his famous treatise al-Fatāwa. He observed that God has commanded the due performance and observation of contracts in quite general terms and concluded that such a command proves that the natural presumption is that the contract and stipulations provided for therein, are valid and permitted.³¹ His disciple, Ibn al-Qayyim, is equally emphatic regarding the binding nature of the contract. He stated that contracts must be duly enforced unless they are contrary to the provisions of the law.³² The rule was adopted by the Turkish Civil Code of 1877,³³ which was entirely based on the Hanifi School of Law. The code did not introduce new principles of law, but simply codified the Islamic principles which served the civil law of the

Ottoman Empire. Art. 83 provided: "a stipulation is to be complied with as far as possible".³⁴

In the LIAMCO v. Libya award, the sole arbitrator, Mahmassani, referred to this rule as a general principle of law and concluded that: "The principle of respect for the agreements is thus applicable to ordinary contract and concession agreements. It is binding on an individual as well as governments".³⁵ After citing a number of declarations of a universal character, custom, case law, international doctrine as well as Islamic law, he concluded that the binding nature of the contract generally held in Islamic law is clearly consistent with the international law principle of pacta sunt servanda. On the basis of that identification, he held Libya responsible for its unilateral act of terminating the concession of the American company. The same view was also followed by another arbitral award given in Aramco's dispute in 1958.³⁶ Basing its decision on the Islamic system of law, the tribunal found that an oil concession agreement concluded between the state of Saudi Arabia and Aramco was valid and binding on the sovereign because it was:

In conformity with two fundamental principles of the whole Muslim System of Law, i.e., the principle of liberty of contract within the limits of the divine law and the principle of respect for contracts Under Muslim law, any valid contract is obligatory, in accordance with the principle of Islam and the law of God, as expressed in the Qur'an: "Be faithful to your pledge to God, when you enter into a pact". 37

The principle is closely connected with the general good as an ultimate purpose of the law. It is based on the doctrine of good faith. The contract once made between the parties by mutual consent, is binding in accordance with the principle pacta sunt servanda.

The principle of sanctity of contract is firmly established in the Islamic legal system. The implication of this principle in the doctrine of state immunity, which is our immediate concern, requires neither emphasis nor elaboration. The rule is so general that a distinction cannot be drawn in this regard between a state or a private individual. One of the authorities already mentioned

places special emphasis on the fact that not only is the Muslim sovereign as much bound by his contract, but also that a breach of faith on his part is much more heinous in its nature and serious in its consequences than that of anyone else. By the same token, a foreign state who entered into contractual obligations in its private capacity is not an exception to this basic principle. All the authorities cited are of general application and special prerogative or immunity is not reserved either to a local or foreign sovereign from the operation of this rule. If a state engaged in a commercial transaction through an ordinary contract, then it should conform to the general rule by which that contract is regulated. The Islamic theory eliminates many of the difficulties which otherwise arise relating to the commercial activities of the sovereign state. The problem is not resolved by reference either to the nature or the purpose of the activities, but simply by recourse to the contractual stipulations. Consequently it may be said that the Islamic legal system would insist on allowing direct access by private individuals against all their contractual partners, whether private or sovereign, and whether the nature or the purpose of the contract is public.

5. The Relevance of Diplomatic Immunity under Islamic International Law

Ambassadors and diplomatic agents, under Islamic international law, are accorded immunity in their capacity as representatives of foreign states and foreign sovereigns. The Qur'ān and the Sunna and the consistent practice of Muslim heads of states clearly establish the privileges and immunities of diplomatic agents. The Qur'ān contains several references to the concept of amān or safe conduct, which forms the basis of diplomatic immunity. This amān obligates the state to protect the diplomat until he leaves the Muslim territory.³⁸ Amān is a trust and must not be breached. According to the Qur'ān: "If a pagan asks you for asylum, grant it to him, so that he may hear the word of God, and then escort him to where he can be secured". Thus security must be given to the

asker, and safe return must follow. These mandates are also clearly endorsed by the Sunna.

In the first years of the Islamic era (C.E. 622), a large number of deputations were received by the Prophet and emissaries sent out by him. The first deputation received was the Ta'if when they went to Medina to declare their submission. The Prophet personally received the head of the delegation, who was not a Muslim. The tents of the delegation were pitched in the yard of the Prophet's mosque - the highest honour which could be accorded to a guest. They entered into a negotiation with the Muslims, following which they offered to accept Islam on certain conditions.³⁹ The Prophet also received a deputation of 60 members from the Christians of Nejran.⁴⁰ When the delegation entered Medina, the Prophet was saying the afternoon prayers. It was reported that the Prophet addressed them thus: "Conduct your prayer here in this mosque. It is a place consecrated to God". They then stood and prayed.⁴¹ This precedent clearly indicates that envoys also enjoyed freedom of religion.

The Prophet also received other delegations from Banu Tayyi',⁴² Banu Tamim,⁴³ the Kings of Himyar,⁴⁴ and from Kina.⁴⁵ While the Prophet received delegations from various tribes in Arabia and envoys from various neighbouring powers, he also sent ambassadors to the Arab and non-Arab rulers. The first delegation despatched by the Prophet was the mission sent to Abyssinia, who succeeded in securing the protection of the Negus, and thereafter delegations were sent to the Byzantine Emperor, the Persian Emperor, the Muquqas or King of Egypt, to the Prince of Ghasan and to the Chief of Hanifa. These deputations were all favourably received and given presents.⁴⁶

Envoys, along with those who are in their company, enjoy full personal immunities. Their persons are sacred and inviolable. They must not be killed nor be in any way molested. The envoy of a foreign power, who was extremely rude and provocative in his behaviour towards the Prophet, furnishes a good precedent. The

Prophet said to him: "Had you not been an envoy, I would have put you to death".⁴⁷ There is also the case of Wahshi, the Abyssinian, who had barbarously murdered Hamza, the uncle of the Prophet, in the battle of 'Uhud. He was mortally afraid to accept the assignment, but he was assured by his people that the Prophet did not ever touch the person of an envoy. And so it was proved when Wahshi presented his credentials. The Prophet allowed no deviation from diplomatic immunity. Equally, when the Quraish sent Abu Raf'i as an envoy to negotiate peace with the Muslims, he declared his faith in Islam and refused to return. The Prophet admonished: "You are an ambassador, you must therefore go back and if you still feel as strongly about Islam as you do now, you are always at liberty to return as an ordinary Muslim".⁴⁸

In so far as personal inviolability is concerned, the majority of Muslim jurists take the view that a diplomat is protected from being prosecuted for purely personal criminal conduct.⁴⁹ But on personal civil acts, there is no precedent and the Muslim Chronicles are silent on the issue. This is difficult to understand since these missions were primarily despatched to facilitate contact for economic and cultural purposes. In addition to their diplomatic functions, these envoys often carried back with them commodities, books and rarities from the Muslim lands.⁵⁰ The property of diplomatic agents was exempt from import duties on the basis of reciprocity. As an eminent scholar of the Hanfi School, al-Shaybani, says:

If the foreign state exempts Muslim envoys from custom duties and other taxes, the envoy of such a state will enjoy the same privileges in the Muslim territory, otherwise they may, if the Muslim state so desires, be required to pay dues like any other visitors. 51

The functions of a diplomat, as stated and practised in the Sunna, are very much like those of today, except for differences brought about by modern technology.⁵² Whenever the Prophet dispatched a mission, he directed it: i) to work patiently; ii) to avoid harshness towards others; iii) to give good tidings to other people and iv) not to incite hostility towards themselves or their

mission.⁵³ It has been argued that activities outside that scope are not considered diplomatic, and the appropriate permissible sanction in such cases is expulsion⁵⁴ and nothing more. Historically, diplomatic relations on much the same mandates, were practised throughout the Middle Ages. Muslim and Christian Chronicles give detailed descriptions of the visits of several Byzantine ambassadors to Baghdad. Most notably, Charlemagne despatched several missions to the Court of Harun al-Rashid (A.D. 799), in which the former, in addition to the exchange of diplomatic correspondence and valuable gifts, sought to establish an alliance with the Abbasid against Byzantine,⁵⁵ or at least to establish friendly relations between the two great rulers of Christendom and Islam.⁵⁶ Thus, in the area of diplomatic protection, Islamic law has historically made a significant contribution.

In the U.S. Diplomatic Staff in Teheran's case,⁵⁷ the judgement of the ICJ took particular account of the traditions of Islam, which contributed along with others to the elaboration of the rules of contemporary public international law on diplomatic and consular inviolability and immunity. The court stated:

The principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime [of diplomatic law], to the evolution of which the tradition of Islam has made a substantial contribution. 58

The point was further illustrated by the dissenting opinion of Judge Salaheddin Tarazi,⁵⁹ who cited an extract from a series of lectures delivered by Professor Ahmed Rechid of Istanbul in 1937 at the Hague Academy of International Law, to the effect that:

In Arabia, the person of an ambassador had always been regarded as sacred. Mohammed consecrated this inviolability. Never were an ambassador to Mohammed or his successors molested The Prophet always treated the envoys of foreign nations with consideration and great affability. He used to shower gifts upon them and recommended his companions to follow his example, saying: "Do the same as I".

He also referred to a work entitled International Law, published by the Institute of State and Law and of the Academy of Sciences of the USSR in which the following account was given:

The Arab states, which played an important part in international relations in the Middle Ages [from the 7th century] had well developed conceptions regarding the Law of Nations, closely linked with religious precepts. The Arabs recognized the inviolability of ambassadors and the need for the fulfilment of treaty obligations. They resorted to arbitration to settle international disputes and considered the observance of definite rules of law necessary in time of war 60

It should, however, be noted that, although there was abundant practice on diplomatic immunity, there was very little practice concerning the position of foreign sovereigns before local Muslim courts in earlier authorities. The plausible justification for this scarcity of practice lies in the fact that sovereigns did not very often go travelling in the territories of other sovereigns, and still less frequently did they commit crimes or enter into contractual relations with private individuals abroad. Due to such paucity of precedents, one finds it necessary to argue from immunities of ambassadors. If diplomatic immunities in Islam are firmly established in favour of ambassadors, afortiori the sovereigns they represented should be entitled to no lesser a degree of favourable treatment, provided that they acted in their public capacity and engaged in no private activities with individuals. It has often been said that it is difficult to deny to the sovereign what was conceded by Islamic law to the ambassador, for it would be absurd to accord the principal less privileges than those enjoyed by his agent.

II. THE ISLAMIC CONCEPTION OF SOVEREIGN IMMUNITY IN PRACTICE

1. Treaty Practice

The Islamic concept of sovereign immunity is evidenced in the practice of some Muslim states. Two instances may be noted. There is a currently a clear trend in most Muslim countries towards Islamization measures which in theory should have the effect of

making the law less secular and more Islamic. Muslim states have also called for the holding of Islamic Conferences and the formation of regional pacts and alliances among Muslim states, and the most important of these organizations is the OIC. Despite the fact that the Charter of the OIC stresses the basic principle of respect for sovereignty and independence, some of the agreements concluded under the auspices of the organization seem to favour a restrictive view of sovereign immunity.

The most notable example is the Agreement for the Promotion, Protection and Guarantee of Investment among Member States of the Organization of Islamic Conference.⁶¹ The Agreement offers a comprehensive dispute settlement machinery by way of conciliation and arbitration (Art. 17). If an award was rendered as a result of arbitral proceedings, it would be final and binding upon the parties and it would not be open to attack on any ground in the court of the contracting state (Art. 17(2)(d)). The decisions of the arbitral tribunal are not only binding on the parties to the dispute but are also extended to all other contracting parties. This is expressly stated as follows:

no matter whether it be a party to the dispute or not and irrespective of whether the investor against whom the decision was passed is one of its nationals or residents or not, as if it were a final and enforceable decision of its national courts.

It is clear that the provision is aiming at excluding any procedural technicalities which might upset the decisions of the arbitral tribunal including the plea of sovereign immunity.

Issues of sovereign immunity proper have been indirectly covered by Art. 16 of the Agreement, which primarily provides for safeguards against harassment within the host state, which is under an obligation to allow the investor the right to resort to its national judicial system:

- 1) to complain against measures adopted by its authorities against him; or

- 2) to contest the extent of its conformity with the provisions and regulations and laws in force in its territory; or
- 3) to complain against non-adoption by a host state of a certain measure which was in the interests of the investor, and which the state should have adopted.

The implications of this provision are thus not limited to the principle that disputes with certain foreign investors should be settled in accordance with the law of the host state and by using local judicial remedies. They include a rejection of any right of the host state to claim the benefit of any immunity before its own courts, in the context of proceedings brought by an investor from another contracting state.

Although this is the principle, it is qualified under the same article in the sense that:

If the investor chooses to raise the complaint before the national courts or before an arbitral tribunal, then having done so before one of the two quarters, he loses the right to recourse to the other.

The significance of Art. 16 will be apparent if we realize that the investor, by virtue of Art. 10(2)(a), already enjoys the right to contest any measure of expropriation adopted by the host state. Most significantly, the right secured by Art. 10 is independent of any general right possessed by the investor to have access to local courts in any other case.⁶² It is clear that Art. 16 is designed to illuminate any plea of sovereign immunity in the context of a complaint made by the investor to bring a suit against the host state and constitutes in the final analysis a waiver of immunity on the part of the host state.

It is possible that the phrase concerning the choice of forum is intended to account for the rather common situation in which a foreign investor insists that, failing the proper conduct of the arbitral proceedings, he be allowed direct access to the local courts for a supervisory role or otherwise. However, in both cases the plea of sovereign immunity does not seem to raise a major

problem: for if the dispute was brought before an arbitral tribunal under the agreement, consent to arbitrate could be construed to be an effective waiver of immunity. If the agreement is implemented in letter and spirit and is seen to be effectively functioning, then Art. 16 could give rise to Islamic community law on investment in which investors would be protected from any procedural impediments concerning sovereign immunity.

2. The Theory in Judicial Practice

The Islamic theory of state immunity has also received judicial endorsement. In point of fact, the efforts towards the formulation of such a theory have resulted in two notable decisions being rendered in one part of the Muslim world. Such utilization of comparative law techniques could become a fruitful device for municipal courts faced with the question of state immunity. Two cases from Pakistan are mentioned here.

It is not easy to explain why Pakistan has been the only Muslim country whose municipal courts have referred to the Islamic concept and why it is only recently that they have done so. The better view seems to be that the Pakistani municipal courts have been influenced to a measurable extent by "The Objectives Resolution" which was passed by the, then, constituent assembly on 7 March 1949,⁶³ which reiterated the Islamic ideals and precepts. They have been equally influenced by the introduction of Islamic laws in the country with effect from 10 February 1979, and as a result, a number of learned Pakistani judges have referred to the various provisions of the constitution in detail, highlighting its various Islamic features and characteristics in support of their findings.⁶⁴ It is in this context that the Islamic conception of sovereign immunity has been resorted to by the Pakistani Supreme Court.

In Mir Baluch Khan and Others v. Mst Lal Bibi and Others,⁶⁵ an action was brought against an instrumentality of a foreign government which pleaded sovereign immunity. The court, in

summarising the different approaches that have been adopted by other legal systems, made the following observations:

The Muslim Shari'a [Islamic law] does not embrace the concept of the British common law that a sovereign can do no wrong and cannot be sued in a municipal court of his own domain. On the contrary in Shari'a, a sovereign can be sued in a court of a Qadi [judge] and like any other citizen is subject to his jurisdiction and bound to carry out any decree or order passed against him by the Qadi. 66

The court concluded that the sovereignty of foreign states was no more involved than was that of the Muslim state when sued in its civil capacity. Accordingly, the court rejected a plea of sovereign immunity and assumed jurisdiction.

Although the decision only briefly employed the comparative method, nevertheless it is a remarkable judgement if one realizes that it was adopted in the early 1970s when the municipal courts of various countries had only started to favour the restrictive doctrine of immunity. Furthermore, it is clear enough from the language used by the court that non-immunity extends even to execution of a judgement rendered against the Muslim state, thus removing one of the obstacles which still persist in international practice, namely the argument that it would be unreasonable to admit a competence in a court which could result only in an empty judgement.

The Islamic approach, as explained by the above case, has been upheld by the Supreme Court of Pakistan in A.M. Qureshi v. USSR.⁶⁷ The court declared itself competent over a suit brought by the plaintiff who claimed to have entered into a contract with the USSR and its trade representative for a commission to supply jeeps and trucks to the Pakistan Government, and alleged breach of contract on the part of the defendant. The USSR appeared before the court and invoked jurisdictional immunities. The judge, who had referred not only to the principles of Islamic law, but also to the recent trend in customary international law, had reviewed international conventions, municipal law and judicial decisions of many countries, as well as the work of jurists and other eminent writers on international law. He held that the test of acta jure imperii and

acta jure gestionis are not the sole tests of determining the availability or otherwise of the immunity of foreign states. There was also a third category of cases under customary international law, namely commercial and trade cases, in respect of which no jurisdictional immunity is available to a foreign state.

Judge Muhammed Afzal Ullah entered into a detailed analysis of the application of the Islamic norms of justice generally and the Islamic Law of Nations in particular.⁶⁸ He made some observations on the question raised by the plaintiff's counsel with regard to the application of Islamic law and judicial norms, in cases like the present one. Having acknowledged the lack of precedents in the Islamic law to resolve a similar dispute, he found it necessary to argue from the general norms of that system. He maintained:

It is no more good to interpret expression "justice, equity and good conscience" to mean the rules of English law, as in any way applicable in Pakistan. Instead, accepted and fundamental principles and judicial norms of Islam, its philosophy, jurisprudence and its common law shall govern the application of the rule of justice and equity as also would control the discretion of the judge when the question of good conscience and fair play is involved. 69

According to this judgment the residuary power possessed by the judges in Pakistan, in the absence of legislation is the "Islamic law of justice and equity" and in interpreting statutes and provisions susceptible to more than one interpretation, the one in conformity with Islamic principles and jurisprudence would be adopted. The judgement also referred to the impression long held in the West that the Muslim law had nothing to contribute to what was inside the covers, and that this law is not of practical content and value. To dispel that impression, he cited various practices from Pakistan, Egypt, Turkey, Iraq, Jordan, and other Muslim countries to show that the Muslim law has been proved to cope with modern theories of law and jurisprudence, and is capable of meeting the particular needs of the modern age.

The judgement also referred to the Islamic Law of Nations and cited various works on the subject. It pointed out that, unlike Soviet, American, and European international law, the Islamic Law of

Nations is the most ancient of its kind, "regulating the relations of various communities and individuals and codified some eight centuries before modern international law had achieved its unquestioned recognition". A detailed examination of the sources of law and comparison with international law was also made in the judgement. The main differences of the two systems are summarized by the courts in the following words.

First, Muslim international law attaches more importance to ethical values because, though the study of international law evolved into an independent branch of law, yet it continued to be subservient to the religion. Second, in Muslim international law we find, for the first time in recorded history, a fully-fledged notion of recognized rights for the enemy, in peace as much as in war. Moreover, Muslim jurists were the first to develop the science of international law as an independent branch of law in general and distinct from political science in particular. 70

However, as section 9 of the Pakistani Code of Civil Procedure, the Treaty between Pakistan and the USSR and the Pakistani State Immunity Ordinance 1981,⁷¹ all confer jurisdiction on the local courts, Judge Afzal Zulla felt that the need had not arisen to spell out the details of Islamic law on the question of state immunity. Yet the Islamic approach to the question, as based on the analogy with the local sovereign, had been stressed by another judge elsewhere in the decision.⁷²

The above two cases serve to show the basic characteristics of the Islamic conception of immunity. Firstly, they rationalize the Islamic approach by reference to spiritual standards and prevalent religion. Islamic rules of justice and equity have been considered as highly relevant to cases of immunity, because what is involved in these cases is essentially a matter of "good conscience and fair interplay". Indeed, substantive justice is the internal aspect of the law which serves to determine the ultimate purpose of the law, namely the 'general good', 'happiness', 'good faith' and 'equality'.⁷³

Secondly, the first case has laid down a comprehensive Islamic doctrine of restrictive immunity by allowing measures of execution to be taken against a foreign state if a judgement is rendered

against it, thereby excluding any doubt that might be raised as to the position of a judgement rendered according to the Islamic theory of immunity. As has been mentioned earlier, this is one of the thorny issues on which various municipal legal systems have greatly varied.

Thirdly, the importance of these decisions lies not only in the remarkable application of the Shari'a to issues of modern international law, but also in the matter in which statutory provisions have been supplemented by Islamic law, which are wider in their application.

Finally, the significance of these decisions also lies in the fact that Islamic law is still considered part of the law of the land and may even override the common law concepts of state immunity. Even in situations of conflict, where the common law rules fail to provide adequate protection to the private individual and the rules of Shari'a cover the issue, it seems that the latter will prevail.

III. AN ASSESSMENT OF THE ISLAMIC APPROACH TO SOVEREIGN IMMUNITY

1. Although cases in which foreign states acting in their private capacity are increasingly made subject to the jurisdiction of the territorial states, the law of state immunities has remained fundamentally that of international law and has continued to be dominated by the principle of state sovereignty. The Islamic approach to the problem eliminates any difficulties which may arise by adherence to the conception of absolute sovereignty. To this extent, the Islamic approach is more consistent with the emerging case law. In an increasingly inter-dependent world, where complex relations exist between government agencies and private entities, the Islamic approach espouses the proposition that a restrictive view of sovereign immunity ought to prevail.

2. The Islamic treatment of sovereign immunity avoids a subjective investigation of the acts of foreign states, an investigation which in most cases proves to be unviable. Thus, at first glance, the Islamic approach appears to be preferable to those taken by other legal systems to solve the difficulties inherent in the characterization of sovereign acts. The test according to the Islamic approach is neither the purpose nor the nature of the transaction, but simply the very contractual obligations created by the agreement. Attempts to view state contracts differently from those of the private individual do not accord with the singularistic nature of the Islamic concept of law and justice and also run counter to the pluralistic character of the contemporary world. The significance of this approach lies in the fact that the Islamic theory is wider in application and provides a far better protection for individuals against arbitrary acts of the states than those adopted by other legal systems in contemporary state practice. This approach, if widely followed by Muslim countries, would inevitably lead to the promotion of international commercial transactions and thus the peaceful cooperation between states is further ensured.

3. One of the streams of evolution in legal analysis that gave rise to the trend toward a restrictive view of immunity in international practice is that domestic legislation began to broaden the extent to which governments were subject under local law to civil suits for their wrongful acts arising from contract or tort. This assimilation of sovereign states with private individuals had been recognized by Islamic law earlier, at a time when it seemed inconceivable to formulate a definite conception of state or its sovereign functions. Apart from the basic principles of justice and fair dealing, another plausible explanation for this approach lies in the Islamic conception of legal order which viewed the individual as a subject of the law governing international relations. Unlike the modern law of nations, which is essentially a law regulating the relations of states, Islamic law is applicable to individuals, states and communities. In this respect it could be

said to have merged in its corpus the public as well as the private law.

Majid Khadduri has particularly emphasized this aspect of difference between the modern and Islamic laws on the ground that an Islamic law of nations does not exist as a separate system, in the sense that modern municipal law and international law, based on different sources and maintained by different sanctions, are distinct from one another. The Islamic law of nations was the Shari'a writ large.⁷⁴ It is well-known that some modern writers such as Kelsen have rejected the traditional view that the rules of international law regulate the relations of states and not of individuals on the ground that, in the ultimate analysis, all law is the regulation of human behaviour.⁷⁵ International law, he asserts, should obligate and authorize the individual as well. Oppenheim concedes that, although the rules of international law are primarily meant for states, sometimes they create rights and obligations for individuals and international organizations.⁷⁶ Islamic law creates rights and obligations for both the state and the individuals and groups composing that state. The public and private law of Islam are complementary to each other, and emanate from a common source. They thus reject the dualistic view according to which municipal law and international law have different sources and are maintained by different sanctions. Instead, there is no dichotomy in Islam between municipal and international legal systems, since they both derive their validity from a super norm, the Shari'a. Thus, both states and private individuals are subject to that unified system. It can be taken for granted that Muslim states, or at least those who have recently adopted the Islamization measures, would welcome the recognition of the principle of assimilation of states with private persons in civil suits, as evolved by current international law. That willingness has already been reflected in some judicial decisions in one part of the Muslim world to the effect that traditionally Islamic law recognized no sovereign immunity to the detriment of private individuals.

4. It seems that the Islamic approach stresses the moral principles apart from religious doctrine, in the relation between individuals and sovereign states. It has been correctly observed that:

The historical experience of Islam, indeed the historical experience of all mankind, demonstrates that any system of public order, on the national as well as on the international level, would lose its meaning were it divorced completely from moral principles. 77

Indeed, these moral considerations could add a new dimension which could further provide a solid basis on which international relations generally, and international trade in particular, could be effectively and peacefully transacted.

5. Although the need to re-examine the rule of absolute immunity in the light of international development cannot be over-emphasized, it may be argued that the Islamic approach has essentially created a system which could lead to the extinction of the doctrine of state immunity itself. Whatever the merits of this argument, it must be recalled that the approach takes the question of the rule of law and the principle of fair dealing as the point of its departure, and consequently treats any case of immunity as an exception and therefore restrictively interprets it. Outside the area of contracts and private acts, the immunity of state and its representatives remained intact and uncontested. At any rate, if the Islamic approach is indeed preferable and objective, then it is curious why it has not been adopted by other legal systems. The only possible explanation for this lies in the absence of adequate comparative materials on the Islamic legal system at the disposal of judges and lawyers of other systems. Although appreciating the value of the comparative method, the sources have been drawn almost exclusively from Western experience. Even with the Muslim states' legal system, the Islamic approach has not been widely adopted. These systems have been melting pots for civil, common and Islamic law principles for a long period of time since decolonization. Nevertheless, recent Islamization programmes in some Muslim states will ultimately pave the way for more and more adoption of Islamic principles as the law of the land. As far as the Islamic approach

is concerned, and in the countries where there have been major Islamization initiatives, there have been notable decisions in which the Islamic approach was adopted: hopefully a similar approach may be followed by other Muslim states.

References - Chapter Seven

1. See Khadduri, War and Peace, op. cit., pp.175-6.
2. See Mohammed Abdu, al-Islam wa al-Nasraniyya (Cairo, 1350 A.H.), p.69.
3. C.H. Alexandrowicz, An Introduction to the History of the Law of Nations in the East Indies, op. cit., p.97. The same author shows that most of these capitulations were revocable unilateral concessions which gradually gave way to irrevocability and inequality and it was at this stage that they became definite to the sovereignty of the territorial state; see ibid., p.100.
4. See al-Husari, op. cit., p.60.
5. See Liebsney, op. cit., pp.328-9.
6. On this prerogative, see Sir William Anson, Laws and Customs of the Constitution (Oxford: Clarendon Press, 1922), Vol. II, Part II, p.300; Chalmers and Asquith, Outlines of Constitutional Law (London: Sweet and Maxwell, 1930), 4th ed., p.150.
7. UK, The General Public Acts 1947, Vol. I, p.861.
8. Q., XVI: 90.
9. Q., V: 9.
10. Quoted by Mohammad Hamidullah, The Muslim Conduct of State, op. cit., p.135.
11. Once a Bedouin, from whom the Prophet had borrowed money, came to demand his debt. The Bedouin, who was by nature very rough and uncouth, began to talk rudely to the Prophet. The companions, resentful of such insulting behaviour, admonished him, saying: "Do you know whom you are speaking to?" The Bedouin said very calmly: "Yes, but I am doing nothing more than demanding my due." The Prophet turned to his companions and said: "You ought to have sided with him because he is in the right." Reported by Ibn-Maja, Sunnan, Chap. XXII.
12. Q., XVIII: 110.
13. Reported by al-Bukharī and Muslim.
14. For other examples, see Mohammad Hamidullah, op. cit., pp.135-7.
15. al-Tabarī, Vol. I, pp.1801-2.

16. See al-Mabsūt Vol. XVI, pp.73-4, 122; Mohammad S. al-Mahmassani, "The Judiciary and al-Mawardi", al-Māwardī Millenium (Cairo, Nov., 1957) (in Arabic).
17. al-Kindī, Governors and Judges of Egypt (Beirut, 1908), p.375.
18. Tayan. Quoted in an informative article by Anderson and Coulson, "The Muslim Rulers and Contractual Obligations", NYULR, 33 (Nov., 1958), 930.
19. al-Mughnī (Cairo: Dar al-Manar, 1367 A.H.), Vol. VIII, p.462.
20. al-Mabsūt, Vol. XVI, p.73.
21. Anderson and Coulson, op. cit., p.929.
22. Q., V: 1.
23. al-Ṭabarī, Jami' al-Bayān 'an Ta'wīl al-Qur'ān (Cairo: Mustafa Mohammed & Sons, 1905-12), Vol. VI, p.33, and see also Anderson and Coulson's article, op. cit., p.923.
24. Q., XVII: 34.
25. al-Ṭabarī, Tafsir, Vol. X, p.61.
26. Q., XXIII: 1-8.
27. Q., XVI: 91.
28. al-Qurṭubī, al-Jami li ahkām al-Qur'ān (Cairo: Matba'at Dar al-Kutub al-Misriyya, 1357 A.H./1938 A.D.), Vol. VI, p.33.
29. See al-Siyuṭī, al-Jami al-Soghīr min Hadīth al-Bashīr al-Nazīr (Cairo: Matba'at Hidhjazī, 1352 A.H.), Vol. II, No. 9213.
30. Reported by Muslim on the authority of Abi Sa'id al-Khudari; see Sahīh Muslim, Vol. III, XVI: 16.
31. Ibn Tayimiya, Majmu'at al Fatawa (Cairo, 1908-11), Vol. III, p.332. See also Anderson and Coulson, op. cit., p.927.
32. Ibn al-Qayyim al-Juzziyya, I'Lām al-Muwaqqi'īn 'an rab al-'Ālamīn (Cairo, 1955), Vol. I, p.299, and Vol. III, pp.337-40.
33. The full name of the code is Majallat al-Ahkam al'Adliyya, The Book of Rules of Justice, which was a product of the Ottoman reform movement which started in 1839.
34. The same rule was later incorporated in the civil codes of almost all Arab countries which were parts of the Ottoman Empire. See Art. 147 of the Libyan civil code; Art. 147 of the Egyptian civil code; Art. 146 of the Iraqi and Kuwaiti codes; Art. 148 of the Syrian code and Art. 221 of the

- Lebanese code. Also see, e.g., P. Nicholas Koundes, "The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contract", Col.J. Transl.L., 9 (1970), p.384 at pp.408 et seq.
35. LIAMCO v. Libya (Award), ILR, 62 (1982), pp.190-3.
 36. The Geneva award of 23 August 1958 in the dispute which concerned a shipping concession granted by the Government of Saudi Arabia to Mr A. Onassis, ibid., Vol. 27 (1963), p.117.
 37. Ibid., pp.163-4.
 38. This point was adequately dealt with in a recent article. See Professor M. Cherif Bassiouni, "Protection of Diplomats under Islamic Law", AJIL, 74 (1980), 609.
 39. For these negotiations, see Sirat Rasul Allah translated by A. Guillaume, The Life of Mohammad (London: Oxford University Press, 1955), p.277, referred to hereinafter as Sirat.
 40. The deputation comprised the 'Aqib, the leader entrusted with policy decisions, the Sayyid, an administrative officer and, finally, the Usqut (bishop), who was a scholar and religious leader. See Sirat, pp.271-3.
 41. Ibid.
 42. See Ibn Sa'ad, Tabaqāt, E. Sachall (ed.) (Leiden, 1905), Vol. I, Part II, p.23.
 43. See Sirat, pp.628-929.
 44. A Kingdom in South Arabia.
 45. A powerful tribe of Central Arabia.
 46. For a detailed account of these missions, see Afzal Iqbal, Diplomacy in Islam (Lahore: Institute of Islamic Culture, 1965), pp.59-92.
 47. al-Sarakhsī, al-Mabsūt (Beirut: Dar al-Ma'rifa, 1986), Vol. X, p.92.
 48. Abu Daūd, Sunan (Cairo: Matba'at Mustafa Mohammed, 1369 A.H.-1950 A.D.), Vol. II, p.111.
 49. According to some jurists there is an exception to the personal inviolability of the ambassador for their commission of Hudud offences (e.g., theft, rebellion, adultery, robbery), but there is no specific reference in the Qur'ān or Sunna to that effect.
 50. See Khadduri, War and Peace, op. cit., p.250.

51. Shah al-Siyar al-Kabīr, Vol. IV, p.67.
52. Bassiouni, op. cit., p.616.
53. Sirat, pp.647-8.
54. Bassiouni, op. cit., p.616.
55. See F.W. Bucker, Harun al-Rashid and Charles the Great (Cambridge, Mass., 1931), pp.34-5.
56. See Khadduri, War and Peace, op. cit., p.248.
57. ICJ Reports, 1980, p.3.
58. Ibid., at p.41.
59. See ibid., pp.58-60.
60. Ibid., p.59.
61. The Agreement was approved and opened for signature by Resolution No. 7112.E of the Twelfth Islamic Conference of Foreign Ministers, held in Baghdad, Iraq, on June 1-5, 1981. As of December 1986, the agreement has been signed by 15 countries and, of these, 7 have deposited instruments of ratification. In accordance with Art. 21, the Agreement will enter into force three months from the date of deposit of the instrument of ratification by 10 countries. For the Arabic text of the Agreement, see the OIC, 12th Conference, Baghdad, 1983, Report of the Conference, App. 3, p.114. The English text may be found in FILJ, I (1986), 407.
62. See Moinuddin, op. cit., p.174.
63. See Constitution of Pakistan, op. cit., p.1.
64. See, e.g., Mst Khurishid Jan v. Farzal Dad, PLD (1964), 558; Zia-ur-Rahman v. The State, ibid. (1974), 4; Moonda and Others v. The State, ibid. (1958), 275. Attention is further invited to the famous judgement of the Pakistani Supreme Court in Zulfikar Ali Bhutto v. The State, ibid. (1979), 741, where a plea was raised for applying certain Islamic laws to the case of the accused. However, the plea was rejected since the case of the accused was tried under the ordinary law applicable before the introduction of the Islamic laws in 1979.
65. PLD (1972), S.C., 84.
66. Ibid., p.86.
67. PLD, XXXIII (1981), 377-460.
68. See ibid., 424-32.

69. Ibid., 425.
70. Ibid. p.341.
71. Ordinance No. VI of 1981.
72. See Nasim Hasan Shah, J., ibid., p.450.
73. See M. Khadduri, The Islamic Conception of Justice, op. cit., pp.136-44.
74. He emphasized this point on the ground that all primitive and ancient systems were essentially personal rather than territorial in character, although he concedes that the leading Hanifi school did recognize enemy jurisdiction during the hostilities. See The Islamic Law of Nations, op. cit., Translator's Introduction, pp.6-7.
75. H. Kelsen, The General Theory of Law, op. cit., p.9.
76. Oppenheim, op. cit., Vol. I, pp.5-6.
77. See M. Khadduri, "The Islamic System: Its Competition and Co-existence with Western States", PASIL (1954), p.51.

CHAPTER EIGHT

CONCLUSIONS

The discussions in the preceding chapters leads to the following main conclusions:

1. International practice on the subject of state immunities has grown primarily and essentially out of the judicial practice of different states, belonging to different legal systems. International conventions, opinions of writers, executive and legislative practices relating to this field are practically all of subsequent growth.

2. The decision of Chief Justice Marshall in the Schooner case (1812), is generally considered to be the leading authority of the absolutist theory of immunity. An examination of that judgement shows that the doctrine of state immunity had been expressed as an exception rather than a rule. Also, English law has always acknowledged that the rule of state immunity has its own natural limits. In the Parlement Belge case, for example, the concept of immunity had been qualified by that of public use. Admittedly, those qualifications have been somewhat ignored in later American and English cases.

In civil law jurisdictions, the evolution of the rule of state immunity has followed a different course during the 19th and early 20th centuries. In these jurisdictions, there was growing evidence from the beginning of a trend towards disallowing immunity claims for cases arising from commercial activities of foreign states. The underlying reasons seem to be that the civil law system, notably through administrative courts, affords a happy method of reconciling a theoretical independence of judicial control with a practical means of seeing justice done, even when the state is the offender.

3. A number of closely interrelated points of legal analysis have contributed towards an awareness of such limitations being revived.

The expansion of state functions and the growth in commercial transactions among states have produced a series of paradoxical consequences in the field of state immunity that could not have been foreseen by the proponents of the doctrine of absolute immunity. Again, national legislations were adopted in various countries to eradicate the immunities of the local state from the jurisdiction of the forum. States also began to waive immunity regularly either in their treaties with other states, or when they concluded commercial agreements for their interests. Finally, the doctrine of absolute immunity was seen as archaic, unfair and discriminatory in application. In consequence of these developments, and in the context of the difficulties to which they gave rise, there has been a steadily progressive evolution in international practice away from the so-called absolute doctrine.

4. There have been significant developments in the law of state immunity since the Second World War. Judicial decisions of various countries have expressed doubts about the position of the absolute theory and its theoretical basis in international law. Even in the case of those countries which were considered as absolute immunity jurisdictions, there has been a strong tendency to abandon the absolute view of state immunity and more readily to admit substantial restrictions on the application of the traditional doctrine of immunity. Perhaps the most significant development has been the negotiation and entry into force of one regional treaty on the subject, several multilateral treaties dealing with some aspects of immunities, and the enactment of seven national statutes codifying the law of foreign state immunity. In addition, several draft conventions on state immunity have also greatly contributed to the progressive evolution of the rules of international law.

5. It is clear that the current rules of international law do not now require, if indeed they ever did, that the territorial state should abstain from exercising its valid jurisdiction over foreign states or their instrumentalities in all cases. However, great caution must be exercised in attempting to define customary rules of international law on state immunity. Although there is an

emerging trend of restricted immunity from national decisions and state practice, yet what is the current rule of international law relating to state immunities depends to a measurable extent "on what degree of consensus is sought for the rule being articulated". Accordingly, there are certain cases of immunity and others of non-immunity. It is in respect of the latter that there is an emerging consensus on a rule of international law which requires a state to characterize certain activities as jure gestionis and thus not subject to immunity. Between these remains a 'grey area' which is subject to determination by future state practice. Indeed, state practice cannot continue to exist in a vacuum but is invariably affected by social, economic and political factors, all of which tend to suggest more and more denial of immunity in suits arising out of acts of foreign states which are performed jure gestionis.

6. The examination of the Egyptian and Sudanese practice relating to state immunity shows: firstly, that between these two neighbouring countries sharing a colonial or semi-colonial past and the present state of political, economic and social transition and reorientation, there is no uniformity of practice in so far as the emergence of customary international law is concerned. The examination clearly shows that a forum state can preserve more or less the freedom to formulate its own version of the law. Secondly, unlike other rules of international law, the rule of state immunity can still be largely determined by municipal law and according to internal administration of justice.

7. The Egyptian practice, reflecting the attitude of Egypt as a territorial state, is fairly consistent in favour of restrictive immunity. The Egyptian judicial decisions since the 19th century have adopted every possible limitation of immunity and overwhelmingly endorsed the distinction between different categories of state acts or different capacities of the state. To this extent, it provides the emerging trend of restrictive immunity with valuable materials and legal analysis. These judicial decisions emphasize how much of the issue of foreign state immunity in today's

international practice is rooted in a long and evolving conceptual analysis rather than something new to our time.

8. Treaty practice is no less illustrative. Egypt has become a party to a number of multilateral conventions of a universal character which have more or less sought to codify some aspects of the rule of state immunities. The significance of the adherence to these conventions by Egypt lies in the fact that Egypt has at least accepted the underlying basis of these instruments, namely the restrictive view of immunity. By contrast, Egypt has concluded only two bilateral treaties with other states in this field. Both of them expressly exclude the application of state immunity in disputes involving commercial transactions of these foreign states. In no case do those treaties make ownership on the part of foreign states a test to determine immunity questions, nor to recognize reciprocity as regulating such questions.

Belonging to the same category is the Egyptian governmental practice. The attitude of the Egyptian Government expressed in both regional inter-governmental and global organizations is fairly settled in favour of restrictive immunity.

9. However, in examining the attitude of the Egyptian Government as a beneficiary of state immunity, particularly when sued before a foreign court or tribunal, a serious divergence can be observed. In almost all cases brought against Egypt abroad, the Egyptian Government chose to raise the plea of sovereign immunity, a move which runs counter to its established practice in other quarters. Thus there exists a definite disjunction between its attitude as a grantor of immunity on the one hand, and its attitude as a recipient on the other. A state which is prepared to subject other foreign states to its jurisdiction in certain cases should normally be expected to refrain from claiming immunity from other territorial jurisdictions if sued there in relation to similar activities. However, in no case does Egypt appear to have explicitly denied the existence of the emerging customary norm. It has at various times invoked this norm in disputes with other states and in debates in

international and inter-governmental organizations. With varying degrees of interest it has participated in diplomatic conferences for codification and development of the law on the subject and, in the work of the Assembly's Sixth Committee, it has entered into numerous treaties, including many general multilateral conventions regulating wholly or partly the matter of foreign state immunity, thus strengthening its firmly established position. This apparent diversity in Egyptian practice does not lead to a denial or depreciation of the restrictive immunity, nor in any way does it affect the opinio juris of the Egyptian state as to what the law is.

10. Perhaps this contradiction may be attributed to various political, economic and other technical or practical factors. The political problem is well-known and there is no practical solution thereto. The economic problem relates, among other things, to the fact that most of the commercial activities of the Egyptian Government are defined by internal law as public in character and thus designed for the society's interests and development. Public entities are created to engage in commercial activities and were designed to operate for that goal. Being thus no longer open to private persons, the Egyptian Government maintains that they should be safeguarded by immunity. As to the practical problems, one important general reason for this apparent contradiction, independent of the nature and merits of the disputes, appears to be lack of information on foreign adjudication, arbitration law and techniques, among some at least, of the state officials or lawyers. Some of the cases discussed show how such problems can simply result from the absence of a degree of training of the state official taking part in the proceeding in which their state is involved. Indeed, this 'technical' deficiency is not peculiar to countries like Egypt or the Sudan, but is common to the majority of developing countries, and in particular when a state or state's entities are involved. For example, when arbitral proceedings are instituted against the Egyptian Government, it is perfectly entitled to dispute, if necessary, the validity of the agreement to arbitrate. But, of course, there are limits to the legal nature of the choice of objections to be raised. One of these limits is indeed not to

raise the objection of sovereign immunity vis-a-vis the jurisdiction of the tribunal itself, since that would seriously threaten the machinery of arbitration, which the parties have freely chosen to settle the dispute.

The attitude of the Egyptian Government in this particular regard has had a lasting negative effect. It is not likely to enhance the credibility of Egypt nor to advance the country's efforts either to attract foreign investment or build up Egypt as a centre for international arbitration. This is particularly true, given the fact that Cairo has been established as a centre for the resolution of commercial disputes in Asia and Africa.

11. As in the case of Egypt, there is no text in Sudanese law which formally grants or disallows immunity from foreign states. But, in contrast to Egypt, the practice of the Sudan, both as a grantor and receiver of immunity, has long been in favour of the traditional rule of absolute immunity. The Sudanese judicial decisions do not provide firm rulings on this matter. The number of decisions is rather limited and all of them are on the facts. The same tendency to grant foreign states sovereign immunity from the Sudanese jurisdiction is also observable in bilateral treaties concluded with other states. Some of them even go to the extreme in allowing immunity in unprecedented cases not hitherto known in state practice. By contrast, the Sudan has not yet become a party to many of the multilateral treaties which deal with some aspects of state immunity. The non-acceptance or delay in acceptance is often caused by factors that have nothing to do with the contents of those instruments, or which do not even implicitly suggest disagreement with the treaties' aims. Nevertheless, the Sudan has become a party to three of these conventions. It is, of course, unnecessary to emphasize the importance of the acceptance of these conventions in a complex branch of law, where municipal law is far from clear. Within the limits of their application, these conventions help to rule out any uncertainty as to the position of foreign states.

12. In so far as governmental practice is concerned, the fundamental position of the Sudanese Government is fairly settled in favour of absolute immunity from foreign jurisdictions, motivated primarily by domestic policies and considerations. The few cases rendered against the Sudan in this respect, appear to lend support to this view. The Sudanese economy requires a greater contribution from foreign sectors. In order not to lose the benefit of certain commercial activities and flow of capital from abroad, it is submitted that the Sudan has to adopt a sensible attitude towards issues of sovereign immunity, especially in relation to foreign trade and imported capital.

Since the Sudan is not a centre for transnational litigation and arbitration, the Sudanese courts could not be expected to generate sufficient judicial decisions to change the law. However, the adoption of a national legislation is highly desirable. The level of commercial activities in the Sudan by foreign governments and corporations has increased greatly, particularly by Arab countries, and clarification of the law of foreign sovereign immunity will encourage these activities by removing some of the present uncertainties.

13. Economically, both Egypt and the Sudan are developing countries and, from their colonial positions, they were born into the free market system and there are usually no other means of finance open to them. As a result they have entered into several treaties as a means of attracting foreign direct investment. Both countries have also enacted various national legislations granting incentives to attain the same objective. State immunity is invariably associated with development and, if a plea of sovereign absolute immunity is to be maintained by them in disputes arising out of their development activities, their future access to the market and their future credit would basically come to an end, since more and more foreign investors would shy away from entering into such agreements with them. This argument is based on the assumption that, for the foreseeable future, both countries will have to maintain some form of relationship with outside trade and investment.

14. Certainly, if the consequences of claiming sovereign immunity in the context of proceedings relating to these economic development activities is to reduce the flow of foreign investment, the end result is likely to be counter-productive, even in the terms of these countries' own national economic development. It must, however, be observed that strictly legal considerations are not the only ones that have to be borne in mind in negotiating economic development agreements with sovereign states and their instrumentalities.

Considerations of prestige, as well as of goodwill and mutual trust, are equally important. Plainly, immunity avoidance cannot be carried to the point of ignoring these and possibly other, considerations that are of vital interest to the parties.

By waiving immunity in these and similar cases, the interests of both countries could also be better served in other directions, since a waiver of immunity would be likely to provide an advantage to those states when they are acquiring goods or services. A prospective seller to them will not be able to justify higher prices on the ground that the purchaser may default, leaving the seller with problems of securing what they may regard as an effective remedy.

15. Politically, and in terms of independence and sovereignty, both Egypt and the Sudan may be regarded as newly independent states. However, independence and sovereignty in this context are a two-sided coin. In the first place, if sovereignty is taken as a territorial concept, one would expect both countries to value their independence very highly and with great jealousy of territorial sovereignty. Secondly, in economic terms, the world is growing more interdependent. No country can claim to be self-sufficient in economic and technological terms: resources and markets are needed by all. The nature of the financial and trade structure of the world dispel any idea of absolute sovereignty. Thus sovereignty no longer seems to have the absolute quality about it that it once displayed. In both countries special emphasis has often been placed on national sovereignty and national independence as an

expression of their need for protection against external interference. Thus, they would not find it easy to accept the principle of state immunity if it conflicted with this principle.

16. But whatever attitude they choose to adopt in this regard the fact that both Egypt and the Sudan agreed to adhere to international instruments limiting sovereign immunities, and their participation in international trade and arbitration, signal their willingness to strike a balance between their countries' interests and the rules of state immunity. In the end, that may be the most important lesson their experiences teach.

17. Today international law is attacked, in essence, on two major grounds which, with a little exaggeration, are represented in the statement that it is neither international nor law. Whereas the doubt as to the legal nature of the rules of international law are of long standing, the denial of their international character is mainly attributable to the rise of the Communist states and the liberation of former colonies. To these countries the international law of today is largely a European product; thus the argument goes, the customary rules of this law should be binding only among those who made them as res inter alios acta. This argument, though invalid in many respects, is yet instructive. It teaches at least that, in order to eliminate a major excuse for the violation of international law, there should be greater participation by other legal systems in the formation and development of international law. For, by reflecting to a greater extent on the principle of non-European legal systems in the rules of international law, the validity and fairness of international law will be more widely recognized and more strongly supported. The process of participation entails a comparative method.

18. The idea of the universality of international law leads one to enquire into the approach adopted by the Islamic legal system to the issue of sovereign immunities. The examination of the position of state immunity under that system shows that different legal systems frequently serve similar ends in quite comparable ways. In today's

universal community of nations, Islamic law can make a valuable contribution to the progressive development of international law generally and the law of state immunity in particular. The Islamic approach to state immunity is based on principles which lend themselves to valuable use in consolidating and expanding the scope of contemporary rules of international law on state immunity. These principles have remained constant throughout the historical evolution of the Islamic Law of Nations, and being rooted primarily in the Qur'anic injunctions, are likely to subsist.

19. One such contribution could be the Islamic concept of sovereignty. In contrast to other legal systems, Islam does not consider the state to be an entity endowed with absolute sovereignty both within its border and in its relations with other states. In the Islamic conception, the will of the state is not unfettered by higher norms; it is subject to the law just as the individual will is. When transferred to the international sphere, this concept is bound to have a greater effect on the abuses of the principle of sovereignty. The Islamic conception can thus help to reinforce this healthy trend towards minimizing the paradoxical consequences of the principle of absolute sovereignty and immunity, so that it will no longer impede the rule of law necessary for international legal order.

20. According to the position occupied by the idea of the rule of law in the Islamic legal system, the issue of jurisdictional immunities of states cannot be determined according to the capacity in which the foreign states act. It is not surprising, therefore, to learn that a Muslim head of state, even when performing a public act, is as much bound to observe his covenants and contracts faithfully as an individual Muslim acting in a private capacity. It is a primary duty of a Muslim ruler to uphold and enforce the law and to set an example in this respect.

21. The binding force of contractual agreements is firmly established in the Islamic legal system. All sources of the Muslim law place great importance on the fulfilment of one's obligations.

They unequivocally require a person to respect his contract. The commands are reiterated in general terms which make them applicable both to individuals and sovereign entities. Under the Islamic legal system the contract makes the law of the parties and neither a party nor a court may unilaterally alter it. To this extent a state party cannot rely on any sovereign immunity to avoid a litigation which might arise in relation to the obligations created by the contract. Once a contract has been concluded, a state party is obliged to perform it, no matter how that affects its sovereign dignity.

It may be asked what is the possible contribution of the Islamic approach particularly in regard to the increasing problems arising from the distinction between acts jure imperii and acts jure gestionis? Since the contract is regarded as the law of the parties which the court must apply, there appears to be no place for a distinction between private and public acts of the state party. The role of the court would be to interpret the contract, determine its scope and oblige the parties to perform it. There is nothing under the Islamic legal system which would allow the court to decline jurisdiction over the contract on the ground that one of the parties is said to have sovereign immunity. Thus the Islamic approach provides a more objective criterion of determining jurisdictional issues away from the often unviable distinction between sovereign and private contracts.

22. Islam's particular view of the individual could be another contribution of Islamic law to the further development of international law. The insistence on the part of Islamic law of allowing individuals direct access to local courts against their sovereign commercial partner, is based in addition to requirements of fair play and justice, on the fact that in Islamic law the individual is regarded as a subject of the law governing international relations and to this extent he must be protected by that law.

23. In the area of the protection of diplomats, Islamic law has historically made a significant contribution. The relevance of this contribution lies in the fact that the Islamic theory of sovereign immunity is basically functional in character since it recognizes that certain matters in the interests of diplomacy require to be exempted from local jurisdiction.

24. At present the Islamic approach to sovereign immunity receives little attention in the practice of Muslim countries. However, if the current Islamization initiatives lead to a revival and reassertion of the Muslim identity, and if Muslim lawyers and judges continue to look to the richness of their heritage for principles and rules applicable to the changing needs of society, there may develop a more firm establishment of Islamic ideas. As a consequence, the future could well see a greater incorporation of the Islamic conception of sovereign immunity into the Muslim countries' legal systems. If this conception gains preponderance in the practice of Muslim countries, it may be considered as a positive contribution towards ascertaining and developing the emerging law in a highly important and complex area. It may even be a necessary step forward on the path that leads to a rule on state immunity equally accepted by all, however long this path may be.

25. Islamic law is claimed to have contributed to the development of both the civil law system and the system of international law. This brief comparative study is not meant to be taken as proof for or against that contribution. Rather, it is to serve merely as an invitation for further research into the rich source material of the law of Islam. To date, little concern has been directed in Western law schools and institutions to the study of Islamic law, either in itself, or as a factor in the development of what Jenks has called the Common Law of Mankind. As the latter could exist only through the evolution and the rapprochement among the different legal systems, it should be useful to direct more attention to such a system as Islamic law.

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